TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 163

CHARLES LAWLOR AND MITCHELL PANTZER, CO-PARTNERS TRADING AS INDEPENDENT POSTER EXCHANGE, PETITIONERS,

vs.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 23, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

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RELEVANT DOCKET ENTRIES.

Aug. 18, 1949. Complaint Filed.

Aug. 18, 1949. Summons Exit.

Oct. 24, 1949. Motion by Paramount Pictures, Inc. to dismiss or in lieu thereof to quash return of service of process filed.

Oct. 24, 1949. Motion by Universal Pictures Co., Inc. to dismiss or in lieu thereof to quash return of service of process filed.

Oct. 24, 1949. Motion by defendant and stipulation of plaintiff to dismiss action as to Metro-Goldwyn-Mayer Corp., filed.

Oct. 24. 1949. In accordance with motion and stipulation filed this action is marked "DISMISSED" as to Metro Goldwyn Mayer. Attest: Robert E. Criswell, Deputy Clerk.

Oct. 25, 1949. Answer of RKO Radio Pictures, Inc. filed.

Oct. 25, 1949. Answer of Twentieth Century Film Corp. filed.

Oct. 25, 1949. Answer of United Artists Corp. filed.

Oct. 25, 1949. Answer of Loew's Inc. filed.

Oct. 25, 1949. Answer of Columbia Pictures Corp. filed.

Oct. 25, 1949. Answer of National Screen Service Corp. filed.

Jan. 23, 1950. Hearing sur motions to dismiss or to quash service CAV.

Jan. 24, 1950. Stipulation of counsel dismissing action as to Universal Pictures Co., Inc. filed.

Jan. 24, 1950. In accordance with stipulation filed this action is marked dismissed as to Universal Pictures Co., Inc. Attest: Gilbert W. Ludwig, Deputy Clerk.

Mar. 27, 1950. Opinion of McGranery, J., granting motion of Paramount Pictures, Inc. to quash return of summons filed.

Mar. 27, 1950. Order of court granting motion of Paramount Pictures Inc. to quash return of summons filed. March 28, 1950 noted and notice mailed.

May 22, 1950. Order to place case on trial list filed.

June 14, 1950. Motion and notice of motion for leave to amend complaint filed.

July 17, 1950. Order of court granting plaintiffs' motion for leave to amend complaint filed—noted and notices mailed July 18, 1950.

July 19, 1950. Amended complaint filed.

Sep. 25, 1950. Answer of Warner Bros. Pictures Distributing Corp. filed.

Sep. 26, 1950. Answer of National Screen Service Corp. to amended complaint filed.

Sep. 26, 1950. Answer of Twentieth Century Fox Film Corp. to amended complaint filed.

Sep. 26, 1950. Answer of United Artists Corp. to amended complaint filed.

Sep. 26, 1950. Answer of Columbia Pictures Corp. to amended complaint filed.

Sep. 26, 1950. Answer of Paramount Film Distributing Corp. to amended complaint filed.

Sep. 26, 1950. Answer of Loew's Inc. to amended complaint filed.

Sep. 26, 1950. Answer of RKO Radio Pictures Inc. to amended complaint filed.

Sep. 26, 1950. Answer of Universal Film Exchanges Inc. to amended complaint filed.

Oct. 9, 1950. Order to place case on trial list filed.

Oct. 20, 1950. Plaintiffs' motion for summary judgment, notice of motion and affidavit in support of motion filed.

Oct. 23, 1950. Stipulation of parties re: contracts and order of court approving same, filed—Oct. 24, 1950 noted.

Nov. 21, 1950. Order of court re: use of license agreement etc. by plaintiff in connection with certain motions, filed. Noted Nov. 22, 1950.

Dec. 20, 1950. Affidavit of Franklin Poul in support of plaintiffs' motion for summary judgment, filed.

Jan. 15, 1951. Motion by plaintiffs to vacate order of Nov. 21, 1950 and unseal answers to interrogatories and notice of motion, filed.

Jan. 25, 1951. Order to withdraw plaintiffs' motion to vacate order of Nov. 21, 1950 and unseal interrogatories filed.

Jan. 29, 1951. Affidavit of Edward Morey, filed.

Jan. 29, 1951. Affidavit of Lester R. Bachner, filed.

Jan. 29, 1951. Affidavit of John Petrauskas, Jr., filed.

Jan. 29, 1951. Affidavit of David J. Melamed filed.

Jan. 29, 1951. Stipulation of counsel to mark case "Dismissed with prejudice" as to Eagle Lion Films Inc., Film Classics Inc., Monogram Distributing Corp., Monogram Pictures Inc., Republic Pictures Corp. and Republic Products Inc. and order of court approving same filed—noted Jan. 30, 1951.

Feb. 9, 1951. Affidavit of Bernard G. Goodman on behalf of Warner Bros. Pictures Distributing Corp. contra plaintiffs' motion for summary judgment filed.

Feb. 14, 1951. Affidavit of Jesse T. Mills on behalf of Loew's Inc. in opposition to plaintiffs' motion for summary judgment, filed.

Feb. 14, 1951. Affidavit of C. A. Hull on behalf of Twentieth Century Fox Film Corp. in opposition to plaintiffs' motion for summary judgment, filed.

Feb. 14, 1951. Affidavit of Ulrik F. Smith in opposition to plaintiffs' motion for summary judgment filed.

Feb. 14, 1951. Affidavit of Ned E. Depinet on behalf of RKO Radio Pictures Inc. in opposition to plaintiffs' motion for summary judgment filed.

Feb. 14, 1951. Affidavit of John J. O'Connor on behalf of

Universal Film Exchanges Inc. in opposition to plaintiffs motion for summary judgment filed.

Feb. 14, 1951. Affidavit of Harry J. Muller on behalf of United Artists Corp., filed.

Feb. 14, 1951. Affidavit of Louis Phillips on behalf of Paramount Film Distributing Corp. in opposition to plaintiffs' motion for summary judgment filed.

Feb. 14, 1951. Affidavit of Leo Jaffe on behalf of Columbia Pictures Corporation in opposition to plaintiffs' motion for summary judgment filed.

Feb. 14, 1951. Affidavit of Walter S. Beck on behalf of National Screen Service Corporation in opposition to plaintiffs' motion for summary judgment, filed.

Feb. 14, 1951. Affidavit of Herman Robbins on behalf of National Screen Service Corporation in opposition to plaintiffs' motion for summary judgment, filed.

Feb. 15, 1951. Hearing on plaintiffs' motion for summary judgment CAV.

Feb. 26, 1951. Transcript of hearing of February 19, 1951, filed.

July 25, 1951. Opinion of McGranery J. denying plaintiffs' motion for summary judgment as to all defendants except National Screen Service Corporation, filed.

July 25, 1951. Order of court denying plaintiffs' motion of summary judgment as to all defendants except National Screen Service Corporation, etc., filed—July 26, 1951 noted and notice mailed.

Oct. 19, 1951. Supplemental interrogatories of Independent Poster Exchange to National Screen Service Corp., filed.

Oct. 26, 1951. Transcript of testimony, October 18, 1951, filed.

Sep. 17, 1952. Defendant National Screen Service Corp.'s answer to plaintiffs' supplemental interrogatory no. 3, filed.

Sep. 22, 1952. Deposition of George H. Kline filed.

Feb. 5, 1953. Transcript of pre-trial Jan. 22, 1953 filed.

Feb. 19, 1953. Amendment to answer of Warner Bros. Pictures Distributing Corp. to amended complaint filed.

Feb. 19, 1953. Amendment to answer of RKO Radio Pictures, Inc. to amended complaint filed.

Feb. 19, 1953. Amendment to answer of Columbia Pictures Corp. to amended complaint filed.

Feb. 19, 1953. Amendment to answer of Loew's Inc. to amended complaint filed.

Feb. 19, 1953. Amendment to answer of United Artists Corp. to amended complaint filed.

Feb. 19, 1953. Amendment to answer of Universal Film Exchanges Inc. to amended complaint filed.

Feb. 19, 1953. Amendment to answer of T. C. F. Film Corp. formerly Twentieth Century Fox Film Corp. to amended complaint filed.

Feb. 19, 1953. Amendment to answer of Paramount Film Distributing Corp. to amended complaint filed.

Feb. 19, 1953. Amendment to answer of National Screen Service Corp. to amended complaint filed.

Feb. 28, 1953. Order of court dismissing case as to Warner Bros. Pictures Inc., filed. 9-29-53 Noted and notice mailed.

Oct. 6, 1953. Transcript of 9-28-53 filed.

Oct. 19, 1953. Argued sur Motion to Dismiss.

Oct. 19, 1953. Transcript of argument sur Motion to Dismiss filed.

Oct. 20, 1953. Argued sur motion by defendants to dismiss or for summary judgment CAV.

Oct. 23, 1953. Transcript of hearing of Oct. 20, 1953 filed.

Oct. 29, 1953. Depositions of Charles Lawlor filed (8-3-50).

Oct. 29, 1953. Depositions of Charles Lawlor filed (12-4-52).

Oct. 29, 1953. Depositions of Charles Lawlor filed (12-11-52).

Oct. 29, 1953. Depositions of Charles Lawlor and Mitchell Pantzer filed (1-20-53).

Oct. 29, 1953. Depositions of Charles Lawlor and Mitchell Pantzer filed (10-2-53).

Oct. 29, 1953. Deposition of Mitchell Pantzer filed (10-3-53).

Nov. 6, 1953. Order granting defendants' motion to dismiss complaint filed. 11-9-53 Noted and notice mailed.

Nov. 6, 1953. Judgment dismissing action, with costs, filed. 11-9-53 Noted and notice mailed.

Nov. 9, 1953. Plaintiffs' notice of appeal filed.

Nov. 9, 1953. Copy of Clerk's notice to U. S. Court of Appeals, filed.

Nov. 12, 1953. Opinion sur Motion to Dismiss filed.

AMENDED COMPLAINT.

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The plaintiff above named brings this civil action against the defendants above named and complains by reason of the following facts:

1. This action is brought under the Act of Congress of October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies," as amended, commonly known as the Clayton Act, and the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

2. The alleged unlawful acts and violations hereinafter described have been and are conceived, carried out and

made effective, in part, within the Eastern District of Pennsylvania, and many of the unlawful acts done in pursuance thereof have been performed, by the defendants within said district. The interstate commerce and trade hereinafter recited is carried on, in part, within the said district. All of the defendants, either are inhabitants of or have agents and transact business within the said district.

3. * * * * * * * *

4. The plaintiffs herein are Charles Lawlor and Mitchell Pantzer, co-partners, trading as Independent Poster Exchange, both citizens and residents of the State of Pennsylvania, and transacting business in Pennsylvania, Delaware and New Jersey.

5. The defendant, National Screen Service Corporation, is a Delaware corporation, and will hereinafter be referred to as NATIONAL. Said defendant, NATIONAL, has an agent and transacts business in the Eastern District of Pennsylvania.

6. The defendant, Columbia Pictures Corp., is a New York corporation and is engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers, and individually, as COLUMBIA.

7. * * * * * * * *

8. * * * * * * * *

9. LOEW'S INCORPORATED, is a Delaware corporation engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers and individually as LOEW'S.

10. * * * * * * * *

11. PARAMOUNT PICTURES, INC., is a New York corporation engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of motion pctures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers, and individually as PARAMOUNT.

12. * * * * * * * *

13. RKO RADIO PICTURES, INC., is a Delaware corporation engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers, and individually as RKO.

14. 20th CENTURY FOX FILM CORP., is a New York corporation and is engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of

motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers, and individually as 20th CENTURY.

15. UNITED ARTISTS CORP., is a Delaware corporation and is engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers, and individually as UNITED.

16. UNIVERSAL PICTURES COMPANY, INC., is a Delaware corporation and is engaged in interstate commerce directly and through wholly owned and controlled and subsidiary corporations in the production, distribution and exhibition of motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers, and individually as UNIVERSAL.

17. WARNER BROS. PICTURES, INC., is a Delaware corporation and is engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers and individually as WARNER BROS.

18. * * * * * * * *

19. The defendant-producers are engaged inter alia in the production and distribution of motion pictures in the United States and throughout the world, including Pennsylvania, Delaware and New Jersey.

20. The defendant NATIONAL is a corporation engaged in the preparation and distribution of advertising materials, art work, photographs, display signs, posters, and advertising motion picture talking film trailers, all designed to aid in the exploitation of the motion pictures produced by the defendant-producers, maintaining branch offices at distribution centers throughout the United States, including Pennsylvania, Delaware and New Jersey.

21. Accompanying each individual feature picture produced and distributed by the defendant-producers, is a series of special drawings, pictures, photographs, lithographs and advertising material and posters which are conceived by the defendant-producers for the purpose of enabling motion picture exhibitors to more successfully attract public patronage to the individual films of the defendant-producers. Such material is made in 8 varying sizes, to wit: 1 sheet, 3 sheet, 6 sheet, 24 sheet, 8″x10″ stills, 11″x14″ photos (in sets of 8), 22″x28″ photos and 14″x36″ insert cards and are collectively referred to in the industry as "standard accessories."

22. Standard accessories are vital and indispensable to the motion picture industry in that they enable theaters exhibiting the motion picture film produced and distributed by the defendant-producers to advertise and exploit to the public the stars, featured players, and scenes suggesting the desirability of viewing the particular film, thereby attracting patronage for the profitable exhibition of the film for which they are created.

23. The plaintiff is engaged in the areas specified in leasing to exhibitors of motion picture films, standard accessories hereinabove more particularly described. These are manufactured, issued and controlled by NATIONAL in conjunction with defendant-producers, and distributed under sole and exclusive franchise arrangements with defendant-producers.

24. Plaintiff is informed, believes and therefore avers, that defendant NATIONAL has obtained from defendant-producers exclusive contracts for the preparation and distribution of standard accessories and advertising material which NATIONAL leases directly to exhibitor customers and also to Plaintiff pursuant to a certain contract dated April 21, 1943, copy of which is attached hereto, marked Exhibit "A." Plaintiff thereafter seeks to lease said standard accessories to the same exhibitor customers.

25. NATIONAL distributes said standard accessories to exhibitors throughout the United States either directly through local offices established by NATIONAL for that purpose, or through contracts and arrangements with independent poster exchanges, of which plaintiff is one, whereby said standard accessories are leased by NATIONAL to the plaintiff and plaintiff in turn leases or rents the standard accessories to exhibitors.

26. Prior to the contract set forth as Exhibit "A," the defendant-producers prepared and distributed their standard accessories and advertising material either directly to the exhibitors to whom they licensed motion picture film, or sold the standard accessories to all poster exchanges, of which plaintiff was one, and defendant NATIONAL was another.

27. Defendant NATIONAL has the sole and exclusive right to determine the price at which the said standard ac-

cessories are leased to plaintiff and the price at which said standard accessories are leased by National to the exhibitor customers, who are also the same potential customers of plaintiff.

28. By virtue of the exclusive right in NATIONAL to determine the price at which said standard accessories are leased to the exhibitor customers, the price at which plaintiff leases the aforesaid standard accessories to its exhibitor customers is also dominated and controlled by NATIONAL.

29. In accordance with the aforesaid contract, Exhibit "A," plaintiff is prohibited and prevented from acquiring or securing standard accessories from any other source whatsoever, except in very limited and emergency situations.

30. Defendant NATIONAL illegally and with intent to destroy plaintiff's business has increased the price of the standard accessories to plaintiff and has so regulated the price of the said standard accessory material to the exhibitor customers that plaintiff is forced to lease its material at a loss in order to compete with prices charged exhibitor customers by the local branch office of defendant NATIONAL.

31. The defendant NATIONAL has the sole and exclusive right to produce and distribute to all exhibitors throughout the United States, motion picture talking film trailers of motion pictures produced by the defendant-producers, except as to METRO-GOLDWYN-MAYER and WARNER BROS.

32. A motion picture talking film trailer is an indispensable form of advertising for motion picture exhibitors. It is a short resume or outline of scenes taken from the motion picture films to be shown in the future in the exhibitor's

theatre, containing selected scenes, advertising slogans, and is shown upon the screen of the motion picture exhibitor to induce the customers to patronize the theatre in order to see the picture so advertised.

33. In the publicizing of a motion picture, time is of the essence and exhibitors require their advertising in advance of the showing dates of the picture being exploited in order to induce and attract the general public to see said motion picture.

34. The defendant NATIONAL, by virtue of its exclusive contracts with the defendant-producers, completely controls the time of delivery of said standard accessories to the plaintiff.

35. Defendant NATIONAL consistently, deliberately, maliciously and pursuant to a general illegal scheme to destroy plaintiff's business, has failed to fulfill the requirements and requests of plaintiff for standard accessories made pursuant to and under the said contract Exhibit "A," in time for plaintiff to service and deliver the said standard accessory advertising material to its exhibitor customers.

36. Said late deliveries to plaintiff have occurred in spite of the fact that the same standard accessory material was available to exhibitor customers in said territory at the local branch office of defendant NATIONAL, located at 1201 Vine Street, Philadelphia, Pa., and to which plaintiff's exhibitor customers were forced to turn when plaintiff was unable to deliver the standard accessory advertising material they had ordered from plaintiff.

37. Defendant NATIONAL, illegally and with intent to destroy plaintiff's business, deliberately reduces the rental price of said motion picture talking trailers to exhibitors if

said exhibitors, including plaintiff's customers, agree beforehand to purchase or lease for the exploitation of all of their films exhibited, standard accessories and advertising materials directly from the defendant NATIONAL.

38. Accompanying each feature picture produced and distributed by the defendant-producers, are a series of special drawings and pictures, lithographs, advertising material and posters, in addition to those designated as, "standard accessories," in Paragraph 21 hereof, which are conceived by defendant-producers for the purpose of enabling motion picture exhibitors to more successfully attract public patronage to the individual films of the defendant-producers. Such material is made in four varying sizes, designated as 30"x40", 40"x60" and 24"x82" and 24"x60", which are referred to in the motion picture trade and industry as, "screen process material," or sometimes as, "photo-offset material."

39. Plaintiff is informed, believes and therefore avers that defendant NATIONAL has obtained from defendant-producers exclusive contracts for the preparation and distribution of "screen process" or "photo-offset material," which defendant NATIONAL leases directly to exhibitor customers.

40. Plaintiff cannot purchase, buy or lease said screen process or photo-offset material from NATIONAL or from defendant-producers under the above arrangement and is unable to supply his Exhibitor customers with this type of material.

41. Defendant NATIONAL is the only organization or company in the United States of America that is producing screen process or photo-offset material, and plaintiff cannot purchase or lease said material from any other source.

42. By virtue of said exclusive contract between defendant-producers and NATIONAL, plaintiff is unable to sell or lease to its exhibitor customers screen process or photo-offset material and is thereby unable to compete with defendant NATIONAL in giving a full and complete poster service to exhibitors.

43. By virtue of plaintiff's inability to give a complete and full poster service to its exhibitor customers, exhibitors have refused, and in the future will continue to refuse, to deal with plaintiff for the rental or purchase of standard accessories.

44. Exhibitors are, at the request and at the urging of defendant NATIONAL, converting their advertising display from standard accessories to screen process and photo-offset material exclusively, thereby limiting plaintiff's market for the sale or lease of said standard accessories.

45. By virtue of its exclusive right to distribute said motion picture trailers, and its illegal price pressure upon the exhibitor customer in the "tie-in" sale hereinabove referred to, the market for plaintiff's product has been narrowed and confined and plaintiff cannot solicit business from the exhibitors in its area in a free, open and competitive market.

46. The purpose and result of this policy and practice has been and will be to persuade, intimidate and coerce many of the plaintiff's customers to cancel similar service with the plaintiff, and to refuse to deal in, purchase or lease the standard accessories offered by the said plaintiff.

47. By virtue of said illegal use by NATIONAL of its monopoly over the production of motion picture talking film trailers, screen process materials and standard acces-

sories, plaintiff has lost considerable business and suffered great damage.

48. The effect of the exclusive contracts between the defendant producers and NATIONAL has been and will continue to be to lessen and eventually eliminate competition or tend to create a monopoly in the distribution, lease and sale of motion picture advertising material and standard accessories in trade or commerce among the several states in accordance with a conspiracy so to do, and such contracts, sales and leases are, therefore, unlawful and in violation of the laws of the United States.

49. Plaintiff is informed, believes, and therefore avers that the defendant-producers, or some of them, have an interest in the defendant NATIONAL, either financially, or through inter-locking directorates, or officers, and in furtherance of a conspiracy to restrain trade and to create a monopoly in the distribution, lease and sale of motion picture advertising material, did grant the exclusive franchise unto NATIONAL, hereinabove referred to.

50. As a result of the said unlawful combination, conspiracy, acts and restraints of the defendants, the plaintiff has suffered great loss and damage as follows:

(a) Plaintiff is unable to adequately secure the standard accessories, advertising posters and material of the defendant producers vital to the proper conduct and operation of plaintiff's business.

(b) Plaintiff has been deprived of its right and ability to profitably buy and lease or sell the products necessary to the conduct of their business in a free, competitive and untrammelled market.

(c) The patronage of the plaintiff's customers has been reduced and will be further diminished.

(d) Plaintiff's market for the sale and lease of its products has been greatly limited and circumscribed.

(e) The damages directly sustained to date by plaintiff by reason of said wrongful acts of defendants is $150,000.00.

51. Each and all of the said illegal acts and practices of the defendants tend to restrain and obstruct interstate trade and commerce in violation of the Sherman Anti-Trust and Clayton Acts.

52. The defendants have threatened to continue their illegal acts and practices and unless such illegal acts and practices are restrained, the plaintiffs will suffer further immediate and irreparable damages.

53. (a) During the period prior to the year 1940, all advertising accessories were manufactured and distributed by the motion picture producing and distributing companies, referred to herein, *supra*, as defendant-producers.

(b) During that period the numerous persons in the motion picture advertising business were able to acquire, and did acquire, directly from the defendant-producers, ample supplies of advertising material for distribution to their customers in the theatre-operating business.

(c) During the year 1940 the defendant NATIONAL obtained the first of the "exclusive contracts" referred to in paragraph 24, supra, from the defendants RKO Radio Pictures, Inc., and Paramount Pictures, Inc.

(d) During the year 1942 NATIONAL entered into a

similar exclusive contract with the defendant Loew's Incorporated.

(e) As a result of the foregoing, plaintiff and other persons in a similar position, on or about April 8, 1942, commenced an action in this Honorable Court, designated as Civil Action No. 2472, against the defendants NATIONAL, Paramount Pictures, Inc., RKO Radio Pictures, Inc. and Loew's, Incorporated, averring, in substance and effect, that the said defendants were conspiring to monopolize, and actually monopolizing, the business of distributing motion picture advertising material, as in truth and in fact they were doing.

(f) The abovementioned action was settled and ended prior to trial by an agreement which resulted in the making of the contract hereinbefore referred to as Exhibit A.

(g) Plaintiffs aver that they entered into said contract against their will and only because they believed that if they refused to enter into the agreement they would be forced to abandon their business altogether; and that the said contract was not a fair or equitable settlement of the litigation but was intended by the defendants to be, and was in fact, a means of perpetuating and extending NATIONAL'S monopolization of the motion picture advertising business.

(h) Thereafter National entered into similarly exclusive contracts with all the other defendant-producers.

(i) Plaintiffs aver that each defendant named in this action conspired with every other defendant to monopolize and has in fact monopolized on a national scale the business of distributing motion picture advertising material in all parts of the United States.

54. (a) The defendant Warner Bros. Pictures Distributing Corp. is a wholly owned subsidiary of the defendant Warner Bros. Pictures, Inc.

(b) Warner Bros. Pictures Distributing Corp. is engaged in the business of distributing the motion pictures produced by Warner Bros. Pictures, Inc., throughout the United States and particularly in the motion picture district of Philadelphia.

(c) Plaintiffs aver that a monopolistic exclusive license agreement such as is hereinbefore described, has been entered into between NATIONAL and Warner Bros. Pictures, Inc.; that Warner Bros. Pictures Distributing Corp. derives advantages from said contract and receives a substantial portion of the profits produced thereby; that Warner Bros. Pictures Distributing Corp. and Warner Bros. Pictures, Inc. have conspired with each other, and with the other defendants herein to create and perpetuate the monopoly herein complained of.

55. (a) The defendant Paramount Film Distributing Corp. is a wholly owned subsidiary of the defendant Paramount Pictures, Inc.

(b) Paramount Film Distributing Corp. is engaged in the business of distributing the motion pictures produced by Paramount Pictures, Inc. throughout the United States and particularly in the motion picture district of Philadelphia.

(c) Plaintiffs aver that a monopolistic exclusive license agreement, such as is hereinbefore described, has been entered into between NATIONAL and Paramount Pictures, Inc.; that Paramount Film Distributing Corp. derives advantages from said contract and receives a substantial portion of the profits produced thereby; that Paramount Pic-

tures, Inc. and Paramount Film Distributing Corp. have conspired with each other, and with the other defendants herein, to create and perpetuate the monopoly herein complained of.

56. (a) The defendant Universal Film Exchanges, Inc., is a wholly owned subsidiary of the defendant Universal Pictures Company, Inc.

(b) Universal Film Exchanges, Inc. is engaged in the business of distributing the motion pictures produced by Universal Pictures Company, Inc. throughout the United States and particularly in the motion picture district of Philadelphia.

(c) Plaintiffs aver that a monopolistic exclusive license agreement, such as is hereinbefore described, has been entered into between NATIONAL and Universal Pictures Company, Inc.; that Universal Film Exchanges, Inc. derives advantages from said contract and receives a substantial portion of the profits produced thereby; that Universal Pictures Company, Inc. and Universal Film Exchanges, Inc. have conspired with each other, and with the other defendants herein, to create and perpetuate the monopoly herein complained of.

WHEREFORE, plaintiffs pray:

(a) That summonses issue directed to each of said defendants commanding them to appear herein, and answer the allegations contained in this Complaint and to abide by and perform such orders and decrees as the Court may make in the premises.

(b) That preliminarily until final hearing and perpetually thereafter, the combination and conspiracy of the de-

fendants, each with the other, in restraint of interstate trade and commerce in the sale and lease of standard accessories, advertising posters, motion picture talking film trailers and material used and useful in the publicizing of motion pictures, be declared illegal and violative of the Sherman Anti-Trust and Clayton Acts.

(c) That preliminarily, until final hearing, and perpetually thereafter, the discriminatory prices charged plaintiff's customers by the defendant NATIONAL for the motion picture talking film trailers be declared illegal and violative of the Sherman Anti-Trust and Clayton Acts.

(d) That preliminarily until final hearing and perpetually thereafter, the defendants herein and each of them and each and all of their respective parent, associated and subsidiary corporations, and each and all of their respective officers, directors, agents, servants and employees, and all persons acting or claiming to act on their behalf, or any of them, be enjoined and restrained from continuing, directly or indirectly, expressly or impliedly, the attempts at monopolization, the monopolies and all restraints of said interstate trade and commerce, and all discriminatory prices and practices in the distribution of standard accessories, advertising posters, motion picture talking film trailers and material used and useful in the publicizing of motion pictures described herein and from entering into, engaging in, accomplishing or consummating directly or indirectly expressly or impliedly, any monopolies or restraints of interstate trade or commerce similar to those alleged herein to be illegal.

(e) That preliminarily until final hearing and perpetually thereafter, the defendants herein and each of them and each and all of their respective parent, associated, and subsidiary corporations, and each and all of their respective officers, directors, agents, servants and employees and all persons acting or claiming to act on their behalf, or any of

them, be enjoined and restrained, directly or indirectly, expressly or impliedly for imposing or enforcing upon the plaintiff, or otherwise engaging in, any and all of the unfair trade and illegal practices described herein, including the licensing by defendant-producers to NATIONAL of the exclusive right and privilege of distributing the standard accessories, advertising posters, motion picture talking film trailers, screen process and photo-offset material, and material used and useful in the publicizing of their motion pictures.

(f) That preliminarily until final hearing and perpetually thereafter, the defendant-producers, and each of them, and each and all of their respective parent, associated and subsidiary corporations and each and all of their respective officers, directors, agents, servants and employees and all persons acting or claiming to act on their behalf, or any of them, be ordered and directed to establish and maintain throughout the United States and particularly in the cities and states wherein the plaintiff operates, a free, open and untrammelled market available to the plaintiff for the sale and leasing of standard accessories, advertising posters, and material used and useful in the publicizing of motion pictures and to permit plaintiff the right and opportunity to procure under fair, competitive conditions the motion picture talking trailers, screen process and photo-offset materials, standard accessories, advertising posters and material which they require in the lawful conduct of their business.

(g) That plaintiff shall have such other further relief as the Court shall deem just and proper.

As hereinbefore recited, the damages directly sustained by the plaintiffs, by reason of the said wrongful acts of the defendants, are as set forth in paragraph 50 hereof, and under the provisions of the Clayton Act, plaintiffs are en-

titled to recover the aforesaid damages three-fold, together with the costs of suit, including a reasonable attorney's fee.

WHEREFORE, the plaintiffs claim to recover from the defendants the total sum of $450,000.00, with interest thereon from the date of the filing of this suit, together with the costs of suit including a reasonable attorney's fee.

VICTOR H. BLANC,
GRAY, ANDERSON, SCHAFFER & ROME,
By FRANCIS T. ANDERSON,
Attorneys for Plaintiffs.

EXHIBIT "A".

AGREEMENT dated the 21st day of April, 1943, between NATIONAL SCREEN SERVICE CORPORATION, a Delaware corporation having an office and place of business at 630 Ninth Avenue, New York City, (hereinafter referred to as "NATIONAL SCREEN"), and CHARLES LAWLOR and MITCHELL PANTZER, trading as INDEPENDENT POSTER EXCHANGE, having an office, and place of business at 1323 Vine Street, Philadelphia, Pennsylvania, (hereinafter referred to as the "POSTER COMPANY"):

WHEREAS, NATIONAL SCREEN is the licensee under exclusive licenses for the purpose of reproducing and/or announcing and/or distributing and/or generally using material which is the proper subject matter of copyright and which is owned and/or copyrighted by motion picture producing and/or distributing companies (hereinafter referred to as the "Material"), and

WHEREAS, NATIONAL SCREEN desires to grant to the POSTER COMPANY and the POSTER COMPANY desires to acquire from NATIONAL SCREEN a non-exclusive license to distribute certain advertising accessories distributed by NATIONAL SCREEN pursuant to the aforesaid licenses, upon the terms, covenants and conditions following, and

WHEREAS, NATIONAL SCREEN during the term hereof, may enter into contracts (hereinafter called "Future Contracts") with other motion picture producing or distributing companies for the exclusive distribution of advertising accessories employing Material of such motion picture producing or distributing companies and that the making of Future Contracts by NATIONAL SCREEN and the granting of a non-exclusive license by NATIONAL SCREEN to the POSTER COMPANY to distribute advertising accessories employing such Material would be to the mutual benefit and profit of NATIONAL SCREEN and of the POSTER COMPANY, and

WHEREAS, in the event of the execution by NATIONAL SCREEN of Future Contracts, NATIONAL SCREEN desires to grant to the POSTER COMPANY and the POSTER COMPANY desires to acquire from NATIONAL SCREEN a non-exclusive license to distribute advertising accessories employing Material which may be the subject matter of Future Contracts upon the terms, covenants and conditions following:

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, it is hereby agreed as follows:

FIRST:

DEFINITION OF CONTRACT ACCESSORIES

The term "contract accessories" for all the purposes herein provided, shall be deemed to mean all acessories (1) of the types and styles set forth in Schedule A annexed hereto and made part hereof, and (2) hereafter and during the term hereof distributed by NATIONAL SCREEN pursuant to exclusive license, granted to NATIONAL SCREEN under contract with any motion picture producing or distributing companies, to reproduce and/or announce and/or distribute and/or generally use advertising accessories employing Material owned and/or copyrighted by such motion picture producing or distributing companies, (3) so long only during the term hereof as NATIONAL SCREEN shall continue to possess such licenses and contracts.

At the present time, "contract accessories" as defined herein are the accessories of the types and styles set forth in Schedule A, distributed by NATIONAL SCREEN, advertising the motion pictures produced or distributed by Paramount Pictures, Inc., RKO Radio Pictures, Inc., and Loew's Inc. and in certain territories only, Monogram Pictures Corporation (13 territories) and Producers Releasing Corporation (all territories except Philadelphia and New York), and it is the intention of NATIONAL SCREEN and of the POSTER COMPANY that in the event NATIONAL SCREEN enters into Future Contracts with other motion picture producing or distributing companies, for exclusive distribution either nationally or within certain territories only, as aforesaid, the POSTER COMPANY shall be entitled to and NATIONAL SCREEN hereby grants to the POSTER COMPANY a non-exclusive license to distribute the contract accessories which are the subject matter of such Future Contracts upon the terms, covenants and conditions hereof.

SECOND:

COVENANT BY POSTER COMPANY WITH RESPECT TO ITS LICENSE

The POSTER COMPANY covenants and agrees at all times hereafter to admit the validity of the copyright to the Material used in the manufacture of the contract accessories and/or the title of the respective motion picture producing and distributing companies thereto, and the validity of the present licenses granted to NATIONAL SCREEN by such motion picture producing and distributing companies and of any exclusive licenses to distribute granted to NATIONAL SCREEN under any Future Contracts by other motion picture producing and distributing companies, and the POSTER COMPANY further covenants and agrees not to violate or infringe the same, or any of them, not to contest the validity or scope thereof, nor to use the contract accessories for purposes other than those described herein, not to aid or encourage others in such violation, infringement, contest or use.

THIRD:

AGREEMENT TO LICENSE AND OBLIGATION TO HIRE

NATIONAL SCREEN agrees during the term hereof to deliver on license to the POSTER COMPANY contract accessories required by the POSTER COMPANY for all proper purposes hereunder. The POSTER COMPANY agrees to acquire all such contract accessories from NATIONAL SCREEN and to obtain no contract accessories through any other source or from any other person, firm or corporation except as otherwise provided in Articles "FIFTH" and "TENTH" hereof.

It is expressly agreed by NATIONAL SCREEN and the POSTER COMPANY that the extent of the duty of NATIONAL SCREEN to deliver contract accessories to the POSTER COMPANY hereunder and the extent of the right of the POSTER COMPANY to acquire contract accessories from NATIONAL SCREEN hereunder shall be measured by the provisions of Article "FIFTH" hereof, subject to the provisions of Articles "NINTH" and "ELEVENTH" hereof.

Nothing herein contained is intended to limit the right of the POSTER COMPANY to acquire advertising accessories other than those herein defined as contract accessories from other sources.

FOURTH:

LICENSE FEES

The POSTER COMPANY will pay to NATIONAL SCREEN, for all contract accessories delivered to the POSTER COMPANY pursuant to this agreement, seven days after billing, the license fees specified in Schedule A annexed hereto, except that as to contract accessories employing Material of Producers Releasing Corporation, Monogram Pictures Corporation and Material which is the subject matter of Future Contracts where the price paid by NATIONAL SCREEN to the manufacturer of the finished contract accessory exceeds the license fee specified in Schedule A (and such price shall be limited to the actual cost price of the contract accessory to NATIONAL SCREEN and shall not include overhead or distribution expense) then the POSTER COMPANY agrees to pay to NATIONAL SCREEN the price paid by NATIONAL SCREEN to the manufacturer. The POSTER COMPANY agrees that in such cases it will accept as conclusive proof of the amount of the actual cost price paid by NATIONAL SCREEN to the manufacturer a written representation and warranty of such cost price signed by a duly authorized officer of NATIONAL SCREEN.

The POSTER COMPANY further agrees to pay to NATIONAL SCREEN, upon demand, any tax, fee or other similar charge in the nature of a sales tax now or hereafter imposed upon a purchaser or licensee by any duly authorized municipal, state or federal authority and based upon the acquisition of contract accessories hereunder or gross sums payable to NATIONAL SCREEN by the POSTER COMPANY.

FIFTH:

ORDERS AND DELIVERY

All orders for contract accessories hereunder are to be submitted by the POSTER COMPANY to the home office of NATIONAL SCREEN, 630 Ninth Avenue, New York City, attention: Don Velde or any other person hereafter designated in writing by NATIONAL SCREEN.

Delivery shall be made by NATIONAL SCREEN to the place of business of the POSTER COMPANY. In all cases of standing orders as hereinafter described, shipping charges are to be paid by NATIONAL SCREEN. In all cases of additional orders as hereinafter described, contract accessories are to be sent "Shipping Charges"—Collect" and such shipping charges are to be paid by the POSTER COMPANY.

The POSTER COMPANY shall from time to time file standing orders in writing with NATIONAL SCREEN which shall be a binding order for the designated number of each of the contract accessories thereafter distributed by NATIONAL SCREEN. Such standing orders shall average a minimum amount of $10.00 per picture (except

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• Westerns are those western pictures which are not of the usual character and type of, and are inexpensively produced as compared with, the distributor's general line of features.

"Westerns" * and "Foreigns" **) exclusive of shipping charges over each three months period during the term of this agreement. In all instances in which such standing orders are filed, NATIONAL SCREEN agrees to ship the said contract accessories to the POSTER COMPANY approximately twenty-four hours after and in any case no later than three (3) days after the date of shipment of the regular allotment of the same accessories to the local exchange of NATIONAL SCREEN.

NATIONAL SCREEN agrees to ship orders in addition to the standing orders provided that during the first thirty days in which this agreement is in effect no minimum shall be required but that thereafter each such additional order shall be for not less than a minimum of $5. exclusive of shipping charges. NATIONAL SCREEN further agrees that such additional orders will be shipped as expeditiously as possible and in any case not later than 72 hours after the receipt thereof, except as hereinafter provided where the contract accessories must be manufactured. In the event that any such additional order cannot be filled out of stock on hand whether new or used and in reasonably good condition, NATIONAL SCREEN agrees to mail notification to the POSTER COMPANY or upon written request of and at the expense of the POSTER COMPANY to telegraph notification, not later than 48 hours after the receipt of the order.

In the event that the place of business of the manufacturer of the contract accessories covered by such additional order is outside the State of New York, the POSTER COMPANY agrees that NATIONAL SCREEN shall have 72 hours within which to mail or telegraph (at the POSTER COMPANY'S expense) notification to the POSTER COM-

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** Foreigns are features produced outside of the United States except such as are produced in the English language by the distributor or a subsidiary or affiliate thereof.

PANY that the order cannot be filled. If in the sole discretion of NATIONAL SCREEN it becomes necessary to telegraph to the manufacturer outside the state and/or to have such manufacturer telegraph to NATIONAL SCREEN in order to comply with the preceding provision, the cost of such telegrams shall be paid by the POSTER COMPANY promptly upon demand therefor. In the event that NATIONAL SCREEN notifies the POSTER COMPANY within the times specified above that any such additional order cannot be filled out of stock on hand but that it will manufacture or cause to be manufactured the contract accessories necessary to fill such order, then in such event the POSTER COMPANY may telegraph forthwith to NATIONAL SCREEN directing that the order should not be placed with the manufacturer and the POSTER COMPANY shall then be entitled to obtain the contract accessories which NATIONAL SCREEN cannot furnish out of stock on hand from another poster company as follows:

(1) Simultaneously with the placing of each such order with another poster company, the POSTER COMPANY shall mail a written report of such exact order to NATIONAL SCREEN.

(2) The POSTER COMPANY shall accept from such other poster company only such contract accessories as are marked with an appropriate notice that they have been licensed by NATIONAL SCREEN for use by the poster company from whom they are obtained.

In the event that NATIONAL SCREEN notifies the POSTER COMPANY within the times specified above that any such additional order cannot be filled out of stock on hand but that it will manufacture or cause to be manufactured the contract accessories necessary to fill such order and the POSTER COMPANY does not telegraph immediately upon receipt of such notification a direction not to place the order, the POSTER COMPANY agrees that NATIONAL SCREEN

may ship such contract accessories not later than six (6) days after receipt by NATIONAL SCREEN of the additional order and that if the place of business of the manufacturer of the contract accessories required to be manufactured to fill such additional order is outside the State of New York, NATIONAL SCREEN may ship within eight (8) days after receipt of such additional order.

In the event that all or any part of any such additional order is not delivered or notice sent by NATIONAL SCREEN as hereinbefore in this Article "FIFTH" provided, NATIONAL SCREEN shall not incur any liability therefor but the POSTER COMPANY shall be entitled to obtain such contract accessories from any other poster company upon the terms and conditions hereinbefore provided for the POSTER COMPANY to obtain contract accessories from another poster company where the contract accessories must be manufactured.

SIXTH:

DISTRIBUTION OF CONTRACT ACCESSORIES PROCURED HEREUNDER

The POSTER COMPANY agrees that it will distribute the contract accessories acquired hereunder solely by lease or rental thereof to exhibitors within the territory of Philadelphia, Pa., as defined in Film Daily Year Book (except that it is understood that up to ten percent of the exhibitor accounts of the POSTER COMPANY may be in a territory adjacent thereto, which said percentage shall be subject to verification by NATIONAL SCREEN, and except that existing accounts of the POSTER COMPANY as of the date of this agreement shall not be affected by this territorial limitation) for use in connection with the exhibition at the exhibitors' theatres of the motion pictures advertised by such accessories; it being understood, however, that the POSTER COMPANY need not procure return of the said contract

accessories if they are used for posting purposes or sign shop work or for salvage departments of theatre circuits.

The POSTER COMPANY agrees that it will not otherwise lease, rent, or distribute the contract accessories except that the POSTER COMPANY shall have the right to deliver contract accessories to any other poster company upon the terms, provisions and conditions of Article "FIFTH" hereof.

Except as herein specifically provided, nothing herein contained is intended to limit the free and unrestricted right of either party to determine and establish its own policies of distribution of the contract accessories, including (1) all questions of rentals charged to exhibitors, or (2) whether or not rentals shall be (a) in bulk or by the piece, (b) under contract or over the counter, (c) on credit or for cash, (d) distributed jointly with other contract accessories under a service contract or distributed separately, or (e) any other matter of distribution policy.

SEVENTH:

TITLE AND POSSESSION

Title to all contract accessories delivered to the POSTER COMPANY hereunder shall at all times remain and be vested exclusively in NATIONAL SCREEN and/or its licensors and the POSTER COMPANY shall have no right of property therein, but only the right to distribute the same, upon the terms and conditions herein contained. The POSTER COMPANY as licensee shall receive, as property of NATIONAL SCREEN and/or its licensors, all contract accessories delivered hereunder which shall remain in the possession of the POSTER COMPANY for the period commencing from the date upon which the POSTER COMPANY obtains the said contract accessories and terminating with respect to each said contract accessory ten years after

delivery thereof. Upon the termination of such period, all said contract accessories then on hand in the possession or under the control of the POSTER COMPANY shall be returned to the local exchange of NATIONAL SCREEN, except as otherwise provided in Article "SIXTH" hereof and except for loss or destruction of any other contract accessories, without fault of the POSTER COMPANY.

EIGHTH:

INSPECTION OF INVENTORIES

The POSTER COMPANY, for all of the purposes of this agreement and during the term hereof, recognizes, (1) that the contract accessories utilize Material which is the proper subject matter of copyright and which is copyrighted and/or owned by motion picture producing and/or distributing companies, and (2) that NATIONAL SCREEN at the present time does not sell the said accessories but leases and rents them exclusively to exhibitors for use in connection with the exhibition at the exhibitors' theatres of the motion pictures advertised by such accessories.

It is of the essence of this agreement and without limitation of the foregoing provisions of this agreement that the POSTER COMPANY will not purchase, hire or otherwise procure any contract accessories from any exhibitors or any other poster company or any source other than NATIONAL SCREEN hereunder, except as otherwise provided in Articles "FIFTH" and "TENTH" hereof.

In order to give effect to this provision, NATIONAL SCREEN will and must mark each contract accessory delivered hereunder with an appropriate notice that it has been licensed for use by the POSTER COMPANY. The POSTER COMPANY will have the right to possess and distribute only such contract accessories as are so marked.

NATIONAL SCREEN shall have the right throughout

the term of this agreement to have no more than two (2) representatives enter without prior notice upon the premises of the POSTER COMPANY during business hours and at reasonable intervals (not exceeding twelve in each respective twelve month period commencing with the date hereof), to inspect the inventories of the contract accessories of the POSTER COMPANY then on hand, which said inspection shall forthwith, on request, be granted to the said representatives of NATIONAL SCREEN. The said representatives shall conduct themselves with decorum and shall in no way hinder or interfere with the normal course of business of the POSTER COMPANY. Their sole mission shall be to ascertain whether all of the contract accessories on hand at the place of business of the POSTER COMPANY have been procured in accordance with the provisions of this agreement.

If the POSTER COMPANY refuses to allow said inspection, or if such inspection reveals that the POSTER COMPANY possesses or distributes any contract accessories not procured in accordance with the provisions of this agreement, it shall be deemed to have breached this agreement in a material respect.

Notice of any such violation shall be given to the POSTER COMPANY in writing by NATIONAL SCREEN and upon the occasion of the second such violation any and all rights of the POSTER COMPANY hereunder shall be terminated at the option of NATIONAL SCREEN to be exercised in writing.

NINTH:

DEFAULT

In the event of a failure of performance on the part of the POSTER COMPANY hereunder, except as hereinotherwise specifically provided, which said failure shall continue for a period of ten (10) days after notice in writing

from NATIONAL SCREEN to the POSTER COMPANY, or if the POSTER COMPANY (if an individual) should die, or if the POSTER COMPANY should fail, dissolve, or be dissolved, make any assignment or trust for the benefit of creditors, or commit any Act of Bankruptcy, or if any receiver, trustee, conservator or custodian should be appointed of or for the POSTER COMPANY or of any property of the POSTER COMPANY, or if a petition under any provisions of the Bankruptcy Act or any amendments thereto, or any other insolvency statute, for adjudication as a bankrupt, or the reorganization, composition, arrangement, extension or any other relief should be filed by or against the POSTER COMPANY, then, and upon the occurrence of any such event, at the option of NATIONAL SCREEN exercised in writing, this agreement and the license granted to the POSTER COMPANY pursuant thereto shall forthwith terminate.

In the event of a default in the payment of license fees by the POSTER COMPANY to NATIONAL SCREEN which shall continue for a period of five (5) days, the first shipment of contract accessories thereafter shall be shipped by NATIONAL SCREEN to the POSTER COMPANY C. O. D. for the amount of such order and the amount of license fees in default, and upon failure of the POSTER COMPANY to pay said amounts C. O. D., NATIONAL SCREEN shall be under no obligation to honor any order of the POSTER COMPANY hereunder until such time as all license fees in default shall have been paid by the POSTER COMPANY to date in full and the POSTER COMPANY shall nonetheless continue to be bound by all of its obligations hereunder until the termination of this agreement.

Except as otherwise provided in Article "FIFTH" hereof, in the event of a failure of performance by NATIONAL SCREEN of its obligations hereunder, which failure shall continue for a period of ten (10) days after notice in writing from the POSTER COMPANY, then thereafter the POSTER COMPANY shall have the option, by notice in

writing, to terminate this agreement, and upon the mailing or delivery of such notice, this agreement shall thereupon terminate.

Upon the termination of this agreement pursuant to the provisions of this Article "NINTH", the POSTER COMPANY shall forthwith deliver all contract accessories in its possession or under its control to NATIONAL SCREEN and NATIONAL SCREEN, by its agents, is hereby authorized to enter upon any premises where such contract accessories or any thereof may be, to take possession of and to remove such contract accessories.

The termination of this agreement shall not release the POSTER COMPANY from its obligation to make all payments for the period prior to such termination, and shall be without prejudice to any other rights or remedies that NATIONAL SCREEN may have at law or in equity for violation of contract or use of contract accessories without right, or otherwise, including remedies for infringement of any proprietary right at common law or any statutory copyright, without license.

The election of any remedy hereunder shall not limit recourse to any other remedy available to the parties hereto by the other terms of this agreement or at law or in equity.

TENTH:

FORCE MAJEURE

In the event that NATIONAL SCREEN shall be prevented from meeting its due dates for shipment or from compliance with its other obligations hereunder because of strike, rationing, shipping restrictions, priorities, or other war measures, the elements, or other acts or circumstances not within the control of NATIONAL SCREEN, then performance hereunder on the part of NATIONAL SCREEN shall be excused during the period of such emergency and

the time for performance, if it be thereafter practical, shall be extended for the time equal to the length thereof.

In the event NATIONAL SCREEN is prevented and excused from performance as aforesaid, the POSTER COMPANY shall be entitled to obtain contract accessories from any other poster company upon the same terms and conditions as are provided in Article "FIFTH" hereof for the POSTER COMPANY to obtain contract accessories from another poster company and such right shall cease upon written notification from NATIONAL SCREEN that the emergency has ended.

ELEVENTH:

TERM

The term of this agreement shall be for three years commencing with May 1, 1943, subject to the terms and in accordance with the provisions of Article "NINTH" hereof. Upon the termination or cessation, without fault on the part of NATIONAL SCREEN, of a present contract or a Future Contract between NATIONAL SCREEN and any of the motion picture producing or distributing companies whereby NATIONAL SCREEN is granted a license as herein described, the duty of NATIONAL SCREEN hereunder to deliver contract accessories employing Material which is the subject matter of such present contract or Future Contract shall thereupon terminate, without liability to NATIONAL SCREEN.

TWELFTH:

ASSIGNMENT

* * * * * * * * * *

THIRTEENTH:

WAIVERS

* * * * * * * * *

FOURTEENTH:

NOTICES

* * * * * * * * *

FIFTEENTH:

NEW YORK LAW

* * * * * * * * *

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals on the 21st day of April, 1943.

NATIONAL SCREEN SERVICE CORPORATION
By Herman Robbins, Pres. (sgd)

(CORP)
(SEAL)

INDEPENDENT POSTER EXCHANGE
By Charles Lawlor
Mitchell Pantzer

Amended Complaint—Exhibit A—Schedule A —Schedule B

SCHEDULE A

Type and Style	License Fee
1 Sheet	.12
3 Sheet	.40
6 Sheet	.90
24 Sheet	2.40
8 x 10 stills (black and white)	.08
11 x 14 lobby displays (set of 8)	.65
22 x 18 lobby displays (each)	.35
14 x 36 insert cards	.20

SCHEDULE B

COST PRICES TO NATIONAL SCREEN OF MONOGRAM PICTURES CORPORATION AND PRODUCERS RELEASING CORPORATION ACCESSORIES

Type and Style	Cost Price
1 Sheet	.12
3 Sheet	.36
6 Sheet	.72
8 x 10 stills (black and white)	.10
11 x 14 lobby displays (set of 8)	.70
22 x 28 lobby displays (each)	.38 (75 for 2)
14 x 36 insert cards	.24

Amended Complaint—Exhibit A—Schedule C
Stipulation of Counsel for All Parties

SCHEDULE C

MONOGRAM PICTURES CORPORATION TERRITORIES REFERRED TO IN ARTICLE "FIRST"

New York
Philadelphia
Washington
Minneapolis
Des Moines
Omaha
St. Louis
Cincinnati
Chicago
Indianapolis
Buffalo
Albany
Kansas City

STIPULATION OF COUNSEL FOR ALL PARTIES.

WHEREAS plaintiffs intend on October 20, 1950 to file a motion for summary judgment in this case, and

WHEREAS defendant NATIONAL SCREEN SERVICE CORPORATION has lent to counsel for plaintiffs copies of contracts between NATIONAL SCREEN SERVICE CORPORATION, on the one hand, and each of the film producers-distributor defendants on the other hand, and

WHEREAS plaintiffs have had made numerous copies of said contracts, with the intent of filing the same in connection with the aforementioned motion, and

WHEREAS, NATIONAL SCREEN SERVICE CORPORATION wishes to have an opportunity to apply to the Court for an order impounding, or otherwise keeping secret, such provisions of the said contracts as deal with the obligations of NATIONAL SCREEN SERVICE CORPORATION to make payments to the film producer-distributor defendants, and

WHEREAS plaintiffs wish to cooperate with NATIONAL SCREEN SERVICE CORPORATION to the extent, but only to the extent, of obtaining a hearing on the merits of such application

NOW, THEREFORE, it is stipulated and agreed as follows:

1. Plaintiffs agree that in the filing of their motion for summary judgment in this case they will temporarily withhold filing copies of any and all contracts between NATIONAL SCREEN SERVICE CORPORATION, on the one hand and the film producer-distributor defendants on the other hand;

2. Defendants agree that they and each of them will not be prejudiced by the withholding of filing of copies of said contracts and agree to waive their rights under the rules of court pertaining to the filing of said copies and to service of copies thereof;

3. Defendants agree that they, or one or more of them will proceed promptly to obtain a ruling of the court on whether

or not the provisions of said contracts pertaining to financial settlements shall be kept secret to any extent;

4. Defendants agree that pending entry of an order of the court plaintiffs shall have unrestricted rights to argue in court or otherwise disclose the fact that the above-mentioned contracts provide that NATIONAL SCREEN SERVICE CORPORATION is obligated to pay to each of the film producer-distributor defendants substantial sums of money in consideration of the right given to NATIONAL SCREEN SERVICE CORPORATION under said contracts, said sums, usually, being based on a percentage of the gross income derived by NATIONAL SCREEN SERVICE CORPORATION.

5. Defendants agree that plaintiffs shall have the right to file of record copies of the contracts in conformity with any order subsequently made by the court.

* * * * * * * *

ORDER.

AND NOW, this 21st day of November, 1950, it is

ORDERED, that, until further order of this court, plaintiffs and their attorneys shall not employ, in connection with any motion or proceeding in this action or otherwise, the full text of any of the financial terms and provisions of license agreements between defendant, National Screen Service Corporation, and its licensors, or otherwise reveal any of such terms and provisions except as hereinafter pro-

vided, to wit: The plaintiffs may so employ the full text of all other provisions of such license agreements and may use, in conjunction therewith and in lieu of the deleted financial terms and provisions, a summary of such terms and provisions setting forth the various methods by which royalties are determined, which summary shall be prepared by National Screen Service Corporation and served on plaintiffs' attorney within ten days from the date hereof.

Plaintiffs shall, within five days after receipt and acceptance of such summary of financial terms and provisions, file and serve on all defendants such further papers as plaintiffs intend to rely upon on their pending motion for summary judgment and as are permitted by this order.

ALLAN K. GRIM,

J.

AFFIDAVIT [IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT].

State of Pennsylvania)
County of Philadelphia) ss.

MITCHELL PANTZER, being duly sworn according to law, deposes and says:

1. I am one of the plaintiffs in this action.

2. On or about December 20, 1940, CHARLES LAWLOR, the other plaintiff herein, and I, as partners, began doing business in the City of Philadelphia as distributors of motion picture advertising materials.

3. Both my partner and I had had considerable experience in dealing with motion picture advertising materials, and had the necessary skill to operate such a business. In particular I had for about three years prior to December 1940 been a seller and booker of films for Monogram Pictures, Inc. in Buffalo, New York and Albany, New York; I have personal knowledge of the fact that CHARLES LAWLOR had been, for about ten years prior to December 1940, in the business of distributing advertising posters to motion picture exhibitors.

4. From personal knowledge I know that the following is a correct statement of the status of the motion picture advertising materials industry prior to 1939.

"Standard" Posters.

(a) Each national distributor of motion picture films created and sold to motion picture exhibitors "standard" posters for display in the lobby or outside the theatre, advertising its own motion pictures. "Standard" posters were a group of certain given types and sizes all of which were made available for every film.

(b) Said "standard" posters were distributed to exhibitors through film exchange offices located in about thirty-two cities throughout the United States, which offices were the same offices through which said distributors arranged for the rental of their motion picture films.

(c) In each of the aforesaid cities there existed one or more independent concerns engaged in the sale and rental of standard posters to motion picture exhibitors. These concerns secured a supply of posters from each of the national

distributors of motion pictures by purchase from the aforementioned local film exchange offices. Said posters were generally purchased at the same price paid by exhibitors to the film distributors, but the independent concerns performed a useful economic function in renting as well as selling and also in enabling the exhibitor to have all his posters conveniently supplied by one source.

Trailers.

(a) All the national distributors of motion pictures except Warner Bros. and Loew's turned over the function of producing and distributing trailers (short films shown to announce a coming attraction) advertising their products to National Screen Service Corporation. National Screen Service Corporation maintained offices in all the aforementioned film exchange cities in which trailers were distributed. Warner Bros. and Loew's distributed trailers advertising their own films through the aforementioned film exchange offices.

Specialty Posters.

(a) Specialty posters include all posters other than standard posters, that is, any posters varying in size, technique of manufacture, or nature of content from the types produced by the national distributors for each motion picture film.

(b) Some specialty posters were prepared by the national film distributors for the advertising of particular films. These were sold to motion picture exhibitors and also to the independent poster distributors in the same manner and with the same effect as in the case of standard posters.

(c) National Screen Service Corporation, or its subsidiaries or affiliates also prepared various specialty accessories and distributed them through the aforementioned local offices.

5. During the period 1939 to 1940, prior to the commencement of plaintiffs' business in Philadelphia, the following changes took place, to my personal knowledge, in the motion picture advertising industry.

(a) Paramount Pictures, Inc. and RKO Radio Pictures, Inc. or subsidiary or affiliated corporations thereof gave National Screen Service Corporation or subsidiary or affiliated companies the exclusive right to make and distribute standard and specialty posters relating to their films. These were distributed at the existing National Screen Service Corporation local offices exclusively, and became unavailable at the offices of the aforesaid motion picture distributors.

(b) National Screen Service Corporation began to distribute at its local offices the standard posters of all the other national distributors of motion picture films, purchasing these posters in the same manner as the independent poster concerns from local film exchange offices.

(c) As a result of the foregoing the independent poster concerns were severely handicapped in providing service to their customers by reason of their inability to secure the current standard posters of Paramount Pictures, Inc. and RKO Radio Pictures, Inc.

(d) Some time in 1940 virtually all of the independent poster concerns in the country were induced to sell, and National Screen Service Corporation purchased, their respective businesses.

(e) During 1940, a few new independent poster concerns came into existence in cities where there had formerly been independent concerns which sold out to National Screen Service Corporation. I do not recall the precise number of the older independent concerns which refused to sell out to National Screen Service Corporation or the number of new concerns which entered the field, but I know, by my personal dealings with them that not long after December 20, 1940 there were in existence throughout the United States about ten independent poster distributing concerns.

(f) In Philadelphia, at the beginning of 1940 there was one independent poster business known as "National Kline". In the early part of 1940 this business sold all its assets to National Screen Service Corporation.

6. When, on or about December 20, 1940, Charles Lawlor and I began doing business in Philadelphia, we were able to secure supplies of all standard posters relating to films produced by all the national distributors of motion pictures except Paramount Pictures, Inc. and RKO Radio Pictures, Inc. directly from the local film exchange offices. In addition we obtained in the same manner specialty posters whenever any of the national distributors produced any. We were able to secure, with difficulty and at a high price, sufficient quantities of posters relating to films produced and distributed by Paramount Pictures, Inc. and RKO Radio Pictures, Inc. to render reasonably satisfactory, although not in all instances entirely complete, service to our customers. These supplies were purchased from Cinema Service Co., Ltd., an independent poster company operating in Montreal, Canada there being no source of supply available in the United States.

7. We have never been able to secure any trailers.

8. During the period from 1940 to the present all motion picture advertising materials, standard posters, specialty posters, and trailers, relating the films produced and distributed by all the national distributors of motion pictures have become unavailable to us, except to the extent that we are permitted to lease certain types of posters from National Screen Service Corporation (as shown by Exhibit A of the Amended Complaint). It is my belief this is due to the fact that all the national film distributors have entered into exclusive franchise agreements with National Screen Service Corporation. Many of such franchise agreements are in writing and I am informed by my attorneys that these (or most of these) have been furnished to them and copied and the copies will be presented to the Court simultaneously with this affidavit. All the national distributors have refused and continue to refuse to supply us with advertising materials directly, and in fact allow only National Screen Service Corporation to distribute advertising materials related to their films (with the exception as to trailers of Warner Bros. and Loew's heretofore noted and with minor deviations on unusual occasions by Monogram Pictures, Inc.)

9. The national distributors of motion picture films heretofore referred to are the only commercially significant source of motion pictures for all the motion picture theatres of the United States. The defendants in this case, other than National Screen Service Corporation, are all the national distributors of motion pictures in the United States.

10. The defendants, Columbia Pictures Corp., Loew's Incorporated, Paramount Pictures, Inc., RKO Radio Pictures, Inc., 20th Century Fox Film Corp., United Artists Corp., Universal Pictures Company, Inc., Warner Bros. Pictures, Inc. or their subsidiary or affiliated corporations produce

and distribute virtually all of the commercially significant motion picture films exhibited in the United States. For example, these corporations, during the season 1943-44 distributed films on which were received 94% of the total film rental paid in this country.

11. * * * * * * * *

.....
Mitchell Pantzer

AFFIDAVIT OF FRANKLIN POUL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

State of Pennsylvania)
County of Philadelphia) ss.

FRANKLIN POUL, being duly sworn according to law deposes and says:

1. He is associated with the firm of GRAY, ANDERSON, SCHAFFER & ROME, attorneys for the plaintiffs.

2. On or about May 16, 1950, counsel for plaintiffs demanded of counsel for the defendants that they make available to plaintiffs copies of all contracts between the defendant NATIONAL SCREEN SERVICE CORPORATION, on the one hand, and each of the other defendants, on the other hand, pertaining to the distribution of trailers, standard accessories and specialty accessories, down to date.

3. At various times between May 16, 1950 and October 17, 1950, counsel for defendants did make available to counsel for plaintiffs a large number of such contracts, and communications in modification thereof.

4. Counsel for plaintiffs were informed by counsel for defendants that the contracts thus made available constituted all such contracts as they had been able to acquire, as of the times mentioned, from their associate counsel in the City of New York and/or from the defendant corporations.

5. A copy of the copies of contracts thus made available to counsel for plaintiffs is attached to and made a part of this affidavit.

* * * * * * * *

TABLE OF CONTENTS.

Abbreviations:
Casanave: Mr. Charles L. Casanave
NSS: National Screen Service Corporation
AA: Advertising Accessories, Inc.
NSA: National Screen Accessories, Inc.
St: Standard Accessories
Sp: Specialty Accessories
Tr: Trailers

TABULATION OF CONTRACTS.

Date of Contract	Film Company	Accessory Company	Subject Matter	Expiration Date	Pages
12-2-35	Columbia Pictures Corporation	Casanave	Sp	9-1-36	1-9
*	*	*	*	*	*
4-12-45	Columbia Pictures Corporation	NSS	St	12-31-49	62-89
*	*	*	*	*	*
7-8-37	Loew's, Inc.	NSA	Sp	12-31-39	151-163
*	*	*	*	*	*
2-6-42	Loew's, Inc.	NSS	St	2-28-52	166-204
*	*	*	*	*	*
8-14-35	Paramount Pict. Dist. Corp.	Casanave	Sp	3-14-36	231-243
*	*	*	*	*	*

12-22-39	Paramount Pictures Inc.	NSS & AA	St, Tr	1-31-45	246-314	
*	*	*	*	*	*	*
1-31-40	RKO Radio Pictures, Inc.	AA	St & Sp	1-31-45	361-388	
*	*	*	*	*	*	*
1-1-44	Twentieth Century Fox Film Corp.	NSS	Sp	12-31-48	499-511	
*	*	*	*	*	*	*
7-1-47	Twentieth Century Fox Film Corp.	NSS	St	12-31-49	522-551	
*	*	*	*	*	*	*
8-22-35	United Artists Corp.	Casanave	Sp	8-22-36	599-613	
*	*	*	*	*	*	*

1-21-46	United Artists Corp.	NSS	St	12-31-49	620-659
*	* * *	*	*	* * *	
9-1-42	Universal Film Exchanges, Inc.	NSS	Sp	12-31-44	679-690
*	* * *	*	*	* * *	
8-1-44	Universal Film Exchanges, Inc.	NSS	St	12-31-49	695-729
*	* * *	*	*	* * *	
3-22-46	Warner Bros. Pictures Dist. Corp.	NSS	St	12-31-49	819-857
3-27-46	Warner Bros. Pictures Dist. Corp.	NSS	Sp	12-31-49	858

EXCERPTS FROM AGREEMENT.

(Page 166) AGREEMENT dated this 6th day of February, 1942, between LOEW'S INCORPORATED, a Delaware corporation, with offices at 1540 Broadway, New York City (hereinafter called "LOEW'S") and NATIONAL SCREEN SERVICE CORPORATION, a Delaware corporation, with offices at 630 Ninth Avenue, New York City (hereinafter called "NATIONAL SCREEN"):

WITNESSETH:

WHEREAS, LOEW'S is engaged in the business of distributing motion pictures and

WHEREAS, NATIONAL SCREEN is engaged in the business of distributing motion picture advertising accessories of the types more fully defined in Schedule "A" attached hereto (hereinafter called "Standard accessories"), and

WHEREAS, NATIONAL SCREEN desires a license to procure and distribute standard accessories based upon "LOEW'S motion pictures" and LOEW'S desires to grant such license, all upon the terms, covenants and conditions hereinafter provided,

NOW, THEREFORE, in consideration of these premises and for other good and valuable consideration, it is agreed as follows:

FIRST:

LICENSE.

LOEW'S hereby grants to NATIONAL SCREEN a license to rent, lease and otherwise distribute during the term of

this agreement standard accessories based upon "LOEW'S motion pictures" as such term is later defined. NATIONAL SCREEN shall not give away the standard accessories licensed hereunder, nor sell nor otherwise pass title from NATIONAL SCREEN to such standard accessories, except that it is understood that where the rental, leasing or other distribution (page 167) hereunder is made for posting purposes or sign shop work or for salvage departments of theatre circuits, NATIONAL SCREEN need not require return of the said accessories from the exhibitor.

SECOND:

TERRITORY

The license granted hereunder shall be for the territory of the United States of America (including Alaska and Hawaii, but not its other territories and possessions).

* * * * * * * *

(Page 174) EIGHTH:

COMPENSATION TO LOEW'S.

[Financial provision omitted.]

* * * * * * * *

(Page 187) THIRTEENTH:

EXCLUSIVE NATURE OF LICENSE.

(a) * * * LOEW'S agrees that it will not during the term of this agreement grant to any person, firm or corporation other than NATIONAL SCREEN, any license to distribute

or manufacture (and LOEW'S will not itself distribute), within the territory of this agreement, any standard accessories based upon "LOEW'S motion pictures". * * *

(Similar provisions appear in the contracts between National Screen Service Corporation and all the other defendants except that the "Whereas" clauses are not found in the agreements executed by Paramount Pictures, Inc. and RKO Radio Pictures, Inc.)

AFFIDAVIT OF HERMAN ROBBINS ON BEHALF OF NATIONAL SCREEN SERVICE CORPORATION

* * * * * * * *

National Screen maintains branch offices in 31 cities strategically situated from coast to coast, so that its representatives may "sell" (actually lease) its products to local theatres wherever they may be located and make prompt local delivery (page 4).

* * * * * * * *

In view of the large expenditures undertaken by National Screen, its long term investment and risk, it wished to be assured of at least a five-year exclusive term, so that it would have some opportunity to amortize its investment and diminish its risks (page 20).

* * * * * * * *

C.A. Hull

AFFIDAVIT OF ~~JOHN J. O'CONNOR~~ ON BEHALF OF TWENTIETH CENTURY FOX FILM CORPORATION.

* * * * * * * *

The accessories which are distributed by National Screen are all based on materials designed by Twentieth Century-Fox for its pictures. The designs and finished art work are copyrighted. National Screen has the accessories which it distributes manufactured from the copyrighted work (page 10).

AFFIDAVIT OF JESSE T. MILLS ON BEHALF OF LOEW'S INCORPORATED.

* * * * * * * *

3. Prior to July, 1937 Loew's Incorporated manufactured and sold or leased to exhibitors the specialty accessories and the standard accessories and the trailers which were used by exhibitors to advertise their forthcoming exhibitions of the feature motion pictures distributed by Loew's Incorporated.

However, Loew's Incorporated only prepared, manufactured and distributed specialty accessories for a few of its feature motion pictures and that form of advertising was not considered of very great importance (pages 1-2).

* * * * * * * *

AFFIDAVIT OF NED E. DEPINET ON BEHALF OF RKO RADIO PICTURES, INC.

* * * * * * * *

These business considerations, among others, led RKO to enter into the contract with National. To RKO that contract represented a practical and workable solution to the problems connected with the accessories business. Not only did it free the local exchanges of the burdens imposed on them by the handling of the accessories business and enable them to devote all their efforts to their primary function, the licensing of motion pictures, but it assured RKO of a profit from the accessories operation. The contract provided for a minimum guaranteed payment by National to RKO against a percentage of the gross, thus automatically turning a loss into a profit (pages 4-5).

* * * * * * * *

AFFIDAVIT OF BERNARD G. GOODMAN ON BEHALF OF WARNER BROS. PICTURES DISTRIBUTING CORP.

* * * * * * * *

The term "standard accessories" when used in this affidavit refers to lithographic, photogelatin, photographic and printed material used to advertise motion pictures such as posters, still photographs, window cards, photographic en-

largements, etc. The term "specialty accessories" refers to materials prepared through the silk screen and photogelatin processes, which are used to advertise motion pictures (page 2).

* * * * * * * *

In most cities where Warner maintained an exchange there were concerns in the business of distributing accessories to exhibitors and these concerns dealt in the accessories relating to all of the motion pictures of Warner and other distributors. These concerns would acquire their standard accessories relating to Warner pictures either from the Warner exchange or from exhibitors who had acquired them from the Warner exchange. These concerns also would have manufactured for them accessories relating to Warner pictures. These concerns were members of a trade association which was called, as I recollect, the National Poster Renters' Association (page 5).

* * * * * * * *

Inasmuch as Warner did not produce specialty accessories, the trade association formed a corporation known as Associated Displays Corporation to produce specialty accessories from materials which we submitted and subject to our prior approval, so that they were of high quality and conformed to our official billing. These agreements were concluded in November, 1939, were for one year on a non-exclusive basis and went into effect January 1, 1940—the interval of time being required to enable the members of this association to build up an inventory of accessories on Warner pictures which would be in distribution on January 1, 1940. Warner continued to maintain its advertising accessories department in each exchange for the distribution of the standard accessories which it manufactured. By

the fall of 1940, both Republic Display Corporation and Associated Displays Corporation had ceased doing business and our contracts with them were mutually cancelled. * * * (pages 5-6).

* * * * * * * *

OPINION [SUR PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT].

McGranery, J. July 25, 1951.

Four actions seeking treble damages and injunctive relief under the Sherman and Clayton Anti-Trust Acts, 15 U. S. C. A. Secs. 1-7 and 12-27, have been filed by separate plaintiffs against the defendants. In each case plaintiffs have moved for summary judgment on the injunctive phase of their actions. It has been stipulated that affidavits relating to the motion filed in any of the actions shall be a part of the record in all the actions, and the motions were argued as a unit. Hence, they will be considered together.

Plaintiffs and defendant National Screen Service Corporation (hereafter referred to as National Screen) are in the business of servicing exhibitors of motion pictures with advertising materials. The plaintiffs, whose operations are centered in the Philadelphia, Chicago, Washington, D. C. and Charlotte, N. C. areas respectively, deal in only signs and posters known as standard accessories, embodying copyrighted materials from motion pictures. The defendant National Screen, operating on a nationwide scale, deals not only in standard accessories, but also specialty accessories (a more elaborate type of display) and trailers (or "previews"). At various times between 1939 and 1947, the other

defendants or their affiliates[1] (hereafter referred to as the producer-distributor defendants) entered into agreements with National Screen granting it the exclusive license to manufacture and distribute standard accessories[2] to their motion picture films on a royalty basis. Affidavits of the producer-distributor defendants recite that the motivation for entering into the contracts with National Screen was their dissatisfaction with the manner in which they had been able to handle the accessory function themselves. Service to exhibitors had frequently been inefficiently performed; the war had increased space and manpower problems; and generally the business had been unprofitable, resulting in substantial losses. National Screen was the only existing concern qualified to take over and perform those services for the producer-distributors. They indicate complete satisfaction with the services performed under the licensing agreements. Not only were they relieved of the "headaches" connected with the business, but losses were converted into profits by virtue of royalties received from National Screen. The justification advanced

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[1] Three of the defendants, Paramount Film Distributing Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corporation, who do not produce but only distribute films, have not themselves entered into contracts with National Screen; the contracts relevant to them were entered into by their respective producer affiliates. The remaining defendants contracted directly with National Screen: Columbia Pictures Corporation, Loew's Incorporated, RKO Pictures, Inc., Twentieth Century-Fox Film Corporation and United Artists Corporation. These defendants, with the exception of United Artists, both produce and distribute films; the latter is exclusively a distributor of motion pictures produced by independent producers.

[2] The various contracts also grant National Screen exclusive privileges with respect to the manufacture and distribution of specialty accessories and, except for Warner and Loew's pictures, trailers. The plaintiffs have never manufactured nor do they desire to manufacture any accessories, and their sole interest in distribution is confined to standard accessories. The charge of monopoly, therefore, is based only on the business of distributing standard accessories.

for the exclusive nature of the agreements is that the type of service required demanded a complete, nationwide distribution organization and National Screen was hence obliged to undertake a great expansion of its facilities which required substantial investment of money.

In 1942 an anti-trust suit was brought in this district by some of the present plaintiffs against some of the present defendants. The action was settled by the execution of sub-license agreements between National Screen and those plaintiffs. All of the present plaintiffs are currently being supplied with standard accessories under sub-licenses.

The plaintiffs contend that National Screen has acquired an unlawful monopoly of the business of distributing standard advertising accessories, in violation of Section 2 of the Sherman Act, and that all defendants have conspired to create the monopoly, in violation of Sections 1 and 2 of the Act.[3]

At the outset it must be noted that the producer-distributor defendants and their subsidiary or affiliated corporations—the so-called "big eight," produce and distribute virtually all the commercial motion picture films in the United States.[4] Hence, one who controls the distribution of

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[3] "• • • [T]he two sections overlap in the sense that a monopoly under Sec. 2 is a species of restraint of trade under Sec. 1." United States v. Socony Vacuum Oil Co., 310 U. S. 150, note 59 at page 226.

[4] It appears that there are only twelve corporations in the United States who are engaged in the business of distributing feature motion pictures on a national scale: The eight defendants in these actions, plus Eagle Lion Films, Inc., Film Classics, Inc., Monogram Distributing Corporation, and Republic Pictures Corporation. There are no figures in evidence which establish the percentage of the market occupied by the eight defendants, but plaintiff Pantzer's affidavit stating that the present defendants, or their subsidiary or affiliated corporations, produce and distribute virtually all of the commercially significant motion picture films exhibited in the United States, is not denied. Nor do the defendants contend or make any attempt to establish as a fact that the eight producer-distributors do not control such a portion of the market of motion pictures that their combined standard accessory business constitutes a monopoly of that business.

standard accessories advertising those pictures necessarily controls the standard accessory market. National Screen contends, in the first place, that the relevant market is the whole motion picture advertising business, of which the accessory and trailer field is a very small part; and secondly, that plaintiffs have no standing to complain of any injury because they have failed to prove, or even assert, that they ever possessed the intention or were prepared to manufacture and distribute, on a nation-wide scale, standard accessories, specialty accessories and trailers—the scope of National Screen's enterprise. American Banana Co. v. United Fruit Co. (166 Fed. 261, aff'd 213 U. S. 347); Triangle Conduit & Cable Co. v. National Electric Products Corp. ((3 Cir.) 152 F. 2d 398). The relevant market may be highly particularized, both geographically and in terms of the part of an industry involved. United States v. Yellow Cab Co. (332 U. S. 218);[5] United States v. National City Lines ((7 Cir.) 186 F. 2d 562); Goldman Theatres v. Loew's Inc., ((3 Cir.) 150 F. 2d 738). Consequently, if the plaintiffs are competing in the substantial interstate commerce of distributing standard accessories, even though on a relatively local scale, they have standing to claim injunctive relief against threatened harm if that commerce is being restrained or monopolized. It is not denied that the plaintiffs are so competing—although the nature of that competition is at issue in the case; and it is established that the distribution of standard accessories is a substantial business[6] in inter-

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[5] At p. 225: "* * * Section 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce, [illegible] specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy."

[6] In the year 1949 the amount of gross revenue received by National Screen from motion picture exhibitors, serviced by its Philadelphia Branch office, by virtue of the sale, lease or rental of standard accessories, was one hundred forty-nine thousand one hundred sixteen dollars and twenty-five cents ($149,116.25).

state commerce.[7] It is, therefore, of no significance that the plaintiffs are not prepared to manufacture standards, specialties and trailers, or to distribute specialties and trailers, or to do business outside their local territories. They are entitled to be secure against monopoly in their local businesses of distributing standard accessories.

On the question of illegal monopoly in the standard accessory field, it is necessary to determine first, whether National Screen possesses monopoly power. "The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition is excluded but that power exists to raise prices or to exclude competition when it is desired to do so." American Tobacco Co. v. United States, (328 U. S. 781, 811). By virtue of its exclusive contracts with the eight other defendants (or their affiliates), National Screen has the power to remove plaintiffs from competition by refusing to supply them under the sub-license agreements, or by refusing to renew those agreements at their

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[7] The distribution of motion pictures by the eight producer-distributor defendants is clearly interstate commerce, United States v. Paramount Pictures, Inc. (334 U. S. 131), and the distribution of standard accessories, containing copyrighted material from the films, is closely connected with and highly analogous to the distribution of the films. Before National Screen's appearance in the picture, the posters were manufactured by the producers and distributed in the same manner as the films themselves, through the film exchanges. Now they are produced by National Screen, with certain materials and supervision being furnished by the producer-distributors; the posters are then shipped by National Screen to its branch offices located in more than thirty cities throughout the United States (the same cities in which the motion picture distributors' film exchanges are located), or to one of the independent poster-renters located in the same cities; from each of these points the materials are rented to the same exhibitors to whom the film exchange offices in the same city rent the films themselves. At no place in the defendants' answers is there a clear-cut admission that the poster-distribution business is interstate commerce. There is no attempt, in their affidavits, to deny the interstate nature of the business, and the court does not entertain any doubt that the business is interstate commerce.

expiration.[8] Whatever competition exists in the distribution of the standard accessories of the films of the eight producer-distributor defendants, which constitute substantially the entire market, exists only at the sufferance of National Screen. "* * * [T]he mere existence of monopoly power, though not exercised abusively, is some indication of illegality. A violation of the statute will come to completion if the defendant has nothing more than a purpose or intent to exercise the power. American Tobacco Co. v. United States, [supra]; United States v. Griffith, [334 U. S. 100], as the cases show, a 'purpose or intent' is present if the acquisition or retention of the power comes about as a consequence of defendant's conduct or business arrangements. United States v. Griffith, [supra, at 105-107]; United States v. Aluminum Co. of America, [(2 Cir.) 148 F. 2d 416]." United States v. Aluminum Co. of America, (91 F. Supp. 333, 342).[9] No specific intent to monopolize is necessary; the only relevant intent is the intent to enter into the business arrangements which give rise to the power. By entering into exclusive agreements with the eight producer-distributor defendants (or their affiliates), National Screen has acquired the power to exclude competition and demonstrated its intent to exercise that power. Hence, it would appear that National Screen is in violation of Section 2 of the Sherman Act.

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[8] Or by servicing plaintiff's customers at prices much lower than those paid to National Screen by the plaintiffs themselves under the sub-licenses. The licensing agreements between National Screen and the producer-distributor defendants contain provisions whereby each licensor is protected from price discrimination against its accessories in favor of the accessories of another producer, and there are also provisions whereby National Screen agrees not to exceed certain prices previously charged by the producer itself, except for the factor of rising costs. There is no provision requiring a minimum price to be charged, and National Screen could, if it chose, grossly undercut the plaintiffs.

[9] Judge Knox's opinion contains an excellent summary of the law of monopoly under Section 2.

It should next be determined whether National Screen has actually exercised its power to exclude competition. There can be "no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with a new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; * * *" United States v. Aluminum Co. of America, ((2 Cir.) 148 F. 2d 416, 431). The words of Judge Learned Hand suggest with amazing accuracy some of National Screen's "exclusionary" activities. The exclusive nature of the original contracts between National Screen and the producer-distributors indicates, indeed, a manoeuvre "actuated solely by a desire to prevent competition." The renewal contracts [10] which are in terms "non-exclusive," demonstrate the same motivation. The producer-distributors agree not to produce or distribute advertising materials themselves, and their right to license anyone in addition to National Screen is made dependent on the assumption by such licensee of the obligation to operate as extensively in scope as does National Screen.[11] In-

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[10] All of the original contracts in effect at the time of the commencement of these actions have expired, except the Loew's contracts, which run to 1952. Four of the producer-distributor defendants have renewed their contracts with National Screen on a basis "non-exclusive" in terms: Columbia, RKO, Fox and Universal. There is not now on the record any contract between National Screen and Paramount, United Artists or Warner. It is not denied, however, that the latter three allow only National Screen to distribute standard accessories relating to their films, and it appears without denial that their operating policies remain the same as they were under the original contracts.

[11] In RKO's contract, a breach of this condition gives National Screen the right to cancel the agreement.

asmuch as National Screen is the only concern, other than the producer-distributors themselves, which has ever operated on such a scale—producing and distributing all three types of advertising materials on a nation-wide basis—potential competition is rendered impossible among existing business concerns. National Screen's sub-licenses to the plaintiffs also demonstrate the exercise of monopoly power to gain a competitive advantage in violation of the anti-trust laws. United States v. Griffith, supra. The agreements limit plaintiffs' operations geographically, in the source of supply they may utilize, and in the customers they may service. National Screen, therefore, not only possesses monopoly power and an intent to exercise that power, but it has in fact exercised the power. And by no stretch of the imagination can it be said that monopoly has been "thrust" upon National Screen unwittingly, or that it has passively achieved its position of pre-eminence. United States v. Aluminum Co. of America, ((2 Cir.) 148 F. 2d 416). The story of its growth is the story of active planning deliberately undertaken and leading inevitably to monopoly. It is entirely irrelevant that there may have been no resort to unfair competitive practices. National Screen has monopolized the field of distributing standard accessories in violation of the law.

The defendants argue that each of the producer-distributors could, in the conduct of their businesses, handle the production and distribution of their standard advertising accessories themselves, without the intervention of any middlemen, as indeed they formerly did;[12] and that, in the lawful exercise of an essential incident of their motion picture

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[12] The producer-distributor defendants' affidavits assert that it was their original policy to distribute standard accessories themselves, without the intervention of any middlemen. Three of these defendants deny categorically that plaintiffs were ever permitted to acquire accessories from them in order to service exhibitors, and one defendant admits furnishing accessories to plaintiffs.

copyrights, each could have delegated the function to an exclusive licensee. The fact that they chose a common licensee, they urge, can make no difference, because the products themselves are non-competitive. That is, a poster advertising a particular Columbia picture is of no value in connection with a Paramount picture, or even with a different Columbia film. Thus, an exhibitor of one picture is not in the market for posters advertising any other picture. Therefore, it is contended, combining in one licensee the exclusive right to distribute posters for all pictures cannot reduce competition where none could have existed between separate licensees. United States v. Winslow, (227 U. S. 202); United States v. United Shoe Machinery Co., (247 U. S. 32). This argument is not supported by the facts. In the first place, it cannot be shown that the posters are intrinsically non-competitive.[13] Except in the type situation which presently prevails in National Screen's arrangements with exhibitors, whereby they are given standard accessory service generally for a flat fee, the products must certainly compete with each other for the exhibitor's advertising dollar. Even if the competitive nature of the posters is held to be a disputed issue of fact, or even if it is assumed that the products are non-competitive in nature, there are not sufficient bases for a conclusion that the field is incapable of being monopolized. Whether competition between posters exists or not, competition between poster-renters does exist, however restricted in nature. And the acquisition by National Screen of exclusive license agreements for the distribution of standard accessories of the "big eight" forecloses competition from a substantial market, a course of conduct unreasonable per se. International Salt Co. v. United States, (332 U. S. 392, 396).

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[13] Provisions in the various licensing agreements prevent National Screen from making price discriminations against one licensor's accessories in favor of another's. These provisions certainly indicate some degree of intrinsic competitiveness between posters advertising different films.

The plaintiffs, therefore, face the threat of the irreparable injury of exclusion from competition by National Screen's monopoly, and they are entitled to injunctive relief against the monopoly under Section 16 of the Clayton Act.

The charge of conspiracy among all the defendants to create a monopoly is based on the fact of the existence of the exclusive contracts between National Screen and each of the eight producer-distributor defendants or their affiliates. No attempt is made to prove an express agreement. Of course, the law is well settled that "It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated, and that the defendants conformed to the arrangement." United States v. Paramount, (334 U. S. 131, 142); accord, Interstate Circuit v. United States, (306 U. S. 208, 226-227); Ball v. Paramount Pictures, Inc., ((3 Cir.) 169 F. 2d 317, 319). "Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the statutes before us." Goldman Theatres v. Loew's, Inc., supra, at 745. The existence of the several exclusive license agreements is evidence of a uniform participation by competitors in a particular system of doing business, and the effect of that system is to create a monopoly in National Screen. Without additional evidence, it cannot be said that a conspiracy exists. The essence of conspiracy, in the absence of actual agreement, is scienter by the conspirators; a mutual awareness of each other's activities, a contemplated concert of action. There may be circumstances in which mutual knowledge should be inferred in the absence of specific proof. See Rostow, "Monopoly under the Sherman Act: Power or Purpose?", (43 Ill. Law Rev. 745, 781-785). Evidence of such circumstances is not available in these cases at this point of the proceedings. The affidavits submitted by the defendants clearly indicate that each producer-distributor entered into its agreement with National

Screen independently, for legitimate business reasons related to its own enterprise; the contracts were entered into over a period of eight years, for varying periods of time, and they contained varying financial provisions which even now appear to be unknown to defendants not privy to a particular contract.[14] Of course, if mutual awareness were actually present, it could not be explained away by such allegations of the "normal processes of competition * * *." United States v. Crescent Amusement Co., (323 U. S. 173, 183). Perhaps proof of mutual awareness may be possible; nevertheless, from the development of the situation as described, it cannot be presumed. Plaintiffs point to various provisions in the licensing contracts which undoubtedly establish that each producer-distributor was aware that the others were also dealing with National Screen; and that much was admitted at the bar of the court during oral argument. Those contract provisions fall short of establishing that each knew the other was dealing with National Screen in such a manner that their combined action would necessarily run afoul of the law. In the answers to the complaints, the producer-distributor defendants deny knowledge of each other's contracts. The court has examined the record carefully and nowhere is the element of mutual awareness admitted or established. Consequently, on the issue of conspiracy, a disputed question of fact appears, precluding summary judgment.

The nature of the injunctive relief prayed is based upon the assumption of the existence of both monopoly and conspiracy, entailing a decree running against all defendants.

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[14] Plaintiffs, who acquired copies of the contracts from National Screen on discovery, were prohibited, by order of Judge Grim on National Screen's motion, from employing the full text of any of the financial terms and provisions of the license agreements between National Screen and its licensors, or from otherwise revealing any of the terms and conditions. Plaintiffs were permitted, however, to use, in lieu of the deleted financial terms, a summary of those terms setting forth the various methods by which royalties are determined.

Since, on summary judgment, monopoly, and not conspiracy, has been established, a decree can issue against monopoly by National Screen, but not against conspiracy by the producer-distributor defendants. Because of the intimate relationship of the latter to the problem of monopoly, it will be difficult to frame a suitable decree leaving these out of consideration. Nevertheless, the plaintiffs are entitled to a decree restraining National Screen from monopolizing the business of distributing standard accessories, so that they will be able to engage in that business under fair, competitive conditions. Rather than issue a decree now, the court feels that it would be more advisable to permit the parties to submit proposed terms for a decree and to hear argument on them. Accordingly, it will be so ordered.

SUPPLEMENTAL INTERROGATORIES PROPOUNDED BY PLAINTIFF INDEPENDENT POSTER EXCHANGE, TO DEFENDANT, NATIONAL SCREEN SERVICE CORPORATION, DATED OCTOBER 19, 1951.

* * * * * * * *

3. State the names and addresses of all poster renting concerns which have been purchased by you or an affiliated corporation, together with the date of purchase.

* * * * * * * *

ANSWER OF DEFENDANT NATIONAL SCREEN SERVICE CORPORATION, TO INTERROGATORY NO. "3" OF PLAINTIFFS' SUPPLEMENTAL INTERROGATORIES DATED OCTOBER 19, 1951.

Advertising Accessories, Inc., a corporation in which the defendant National Screen Service Corporation owned stock and with which corporation, in July 1941, the defendant National Screen Service Corporation subsequently merged, acquired the following poster renters:

Poster Renter	Address	Date of Acquisition
Homer L. Blackwell d/b/a *Independent Poster Exchange*	110 W. 18th Street Kansas City, Mo.	2-1-40
National-Kline Poster Company (a Penn. Corporation)	1305-07 Vine St., Philadelphia, Pa.	2-2-40
Leroy Kendis and Philip Kendis d/b/a *"Exhibitors Poster Service Company"*	2108 Payne Ave. Cleveland, Ohio	2-17-40
Gustave Earl LeVeque d/b/a *"Cinema Service"*	2310 Cass Ave. Detroit, Mich.	2-24-40
Premier Advertising Service (a partnership)	1710 Wyandotte St. Kansas City, Mo.	2-29-40
Carolina Poster Exchange, Inc.	300 W. Third St. Charlotte, N. C.	3-2-40
Photoplay Advertising Company (a partnership)	1243 So. Wabash Ave. Chicago, Ill.	3-2-40
Exhibitors Poster Service Co. Inc.	58 Glenwood Minneapolis, Minn.	3-2-40

Gilbert C. Clark, d/b/a *Clark's Poster Service*	606 West Grand St. Oklahoma City, Okla.	3-2-40
Chicago Poster Exchange (a partnership)	1257 So. Wabash Ave. Chicago, Ill.	3-4-40
National Poster Exchanges, Inc.	1508 Davenport St. Omaha, Neb.	3-4-40
Movie Poster Service-H. T. Liebtag, Inc.	359 No. Illinois St. Indianapolis, Ind.	3-11-40
Exhibitors Poster and Supply Company (a New York corporation)	630 Ninth Ave. New York City	3-11-40
Progressive Poster Exchange, Inc.	630 Ninth Ave. New York, N. Y.	3-11-40
Dallas Texas Allied Poster Exchange (a partnership)	302 So. Harwood St. Dallas, Texas	3-12-40
Rex Wilson Art Service Inc.	1574 W. Washington Blvd. Los Angeles, Cal.	3-30-40
Western Poster Company (a corporation)	111-117 Golden Gate Ave. San Francisco, Cal.	3-30-40
Western Poster Northwest Co. Inc.		
Southern Poster Co. Ltd.		

Display Company (a partnership)	1627 Boulevard of Allies, Pittsburgh, Pa.	4-8-40
H. C. Craven d/b/a *Exhibitors Service Company*	2310 Cass Ave. Detroit, Mich.	4-18-40
Theatre Display Corporation	1076 Broadway Albany, N. Y.	5-6-40
Economy Poster Exchange, Inc.	505 Pearl St. Buffalo, N. Y.	5-6-40
Harry Wenzel d/b/a Mutual Advertising	130 Meadow Ave. New Haven, Conn.	5-6-40
Poster Exchange, Inc.	183½ Walton St. Atlanta, Ga.	6-1-40
Rex Poster Exchange, Inc.	223 So. Liberty St. New Orleans, La.	6-1-40
D. C. Poster Exchange, Inc.	212 H. Street, N. W. Washington, D. C.	6-1-40
Peerless Advertising	392 Second St. Memphis, Tenn.	6-1-40
Denver Poster Exchange, Inc.	2106 Broadway Denver, Colo.	7-1-40
Behrends Motion Picture Supply House, Inc.	630 Ninth Ave. New York, N. Y.	8-1-40

State of New York)
County of New York) ss.

HERMAN ROBBINS being duly sworn, deposes and says:

I am the President of NATIONAL SCREEN SERVICE CORPORATION, and I am executing the answers to the foregoing interrogatories on its behalf as its President. The answers thereto were prepared by the employees of NATIONAL SCREEN SERVICE CORPORATION from the records and files and from information furnished by employees of NATIONAL SCREEN SERVICE CORPORATION. The answers are true to the best of my knowledge, information and belief.

HERMAN ROBBINS.

Sworn to before me this 15th day of September, 1952.

/s/ HENRY R. DANZIGER,
Notary Public, State of New York.

Commission Expires March 30, 1954.

ORDER.

Before KIRKPATRICK, Ch. J.

The defendants' motion to dismiss the complaint is granted.

By the Court,
Attest: LEO A. LILLY,
Clerk.

November 6, 1953.

JUDGMENT.

Before KIRKPATRICK, Ch. J.

AND NOW, to wit: November 6, 1953, in accordance with order granting defendants' motion to dismiss, it is ordered that the above action be and the same is hereby dismissed, with costs.

By the Court,
Attest: ROLAND J. GREENWOOD,
Deputy Clerk.

[OPINION] SUR MOTION TO DISMISS.

Before Kirkpatrick, Ch. J.

In this action, commenced in 1949, the complaint charges the defendants with having, as the result of a conspiracy among them, created a monopoly in the distribution of copyrighted motion picture advertising accessories, in violation of the Sherman and Clayton Acts, through the granting, by the producer defendants, of exclusive licenses to the defendant, National Screen, to manufacture and distribute such material. The plaintiffs are distributors of motion picture advertising accessories and claim to have been injured in their business as a result of their inability to obtain the monopolized material in a free market.

In 1942 these same plaintiffs (together with others) instituted an action against National Screen and three of the present producer defendants, also based upon anti-trust violations by means of the same exclusive license contracts

to National Screen which are the basis of the present suit. That action was ended in 1943 by a judgment of dismissal with prejudice entered by stipulation. At the same time, a general release was given by the plaintiffs and a contract entered into by which the plaintiffs received a license from National Screen, under which license, renewed in 1946, they have since been carrying on their business in competition with National Screen.

I am of the opinion that the judgment in the 1942 action is res judicata of the claim asserted in the present suit and is a bar to this action. The principles supporting this decision, all of which have been at one time or another disputed by the plaintiffs are:

1. A dismissal with prejudice is a final judgment on the merits and will bar a second suit between the same parties on the same cause of action. United States v. Parker, 120 U. S. 89. The fact that it was entered in pursuance of an agreement by the parties does not affect its binding force. A consent judgment, as distinguished from a judgment by confession entered on a warrant of attorney, is "as conclusive of the rights of the parties as an adverse judgment after trial, being res judicata of all questions which might have been litigated in the suit." 50 C. J. S., Judgments, Sec. 633, page 62. "It is clearly so, when, as here, the judgment recites that the subject-matter of the suit had been adjusted and settled by the parties. This is equivalent to a judgment that the plaintiff had no cause of action, because the defence of the defendant was found to be sufficient in law and true in fact." United States v. Parker, supra, page 95. There are some opinions of state courts which appear to hold that such a judgment is not a judicial act but merely an administrative approval and recording of an agreement between the parties. The overwhelming weight of authority is to the contrary. See case note, 2 A. L. R. 2nd, page 563, Sec. 17.

There is nothing in what the Court said in United States v. International Building Co., 345 U. S. 502, which is in any way inconsistent with the rule of United States v. Parker, supra. In the International case, the Court held that the second suit was for a new and different cause of action and that, for that reason, res judicata could not apply. The Court then proceeded to consider the doctrine of collateral estoppel—a rule which comes into play when the parties are the same but the causes of action different. The difference between res judicata and collateral estoppel is that in the former every issue which might have been litigated in the first action, whether it actually was or not, is concluded by the judgment, whereas in the latter the estoppel extends only to such issues as actually were decided. The question of exactly what issues were before the court and how they were determined may be raised, and the agreement upon which the judgment was based may, therefore, be considered in a collateral estoppel case. It was in connection with that point that the Court said "A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the cause, the judgment has no greater dignity, *so far as collateral estoppel is concerned*, than any judgment entered only as a compromise of the parties." (Emphasis supplied.)

2. The cause of action asserted in the present case is, to all intent and purposes, identical with that of the 1942 action. The conspiracy charged is the same conspiracy. The contracts by which it was alleged to have been accomplished are the same contracts; and the same evidence, the same witnesses and the same documents would be necessary in the trial in both cases. The fact that additional defendants have been added does not change it. The unlawful acts charged against the defendants in the 1942 action were not merely the making of the consummated and then existing license contracts with three of the present defendants, but

the complaint also charged that those licenses were a step in a general illegal scheme of monopolization and that the defendants were at that time engaged in the process of extending the monopoly by negotiating similar contracts with other major producers, by which National Screen would acquire the exclusive distribution of all motion picture advertising matter. The additional defendants sued in the present action are, admittedly, the other major producers referred to. In Hochman v. Mortgage Finance Corp., 289 Pa. 260, the Court said "We conclude, from our examination of the record, that there was an identity of subject-matter, cause of action, parties, and quality in the persons for or against whom the claim is made, in the two proceedings, and the addition of other parties to the original action did not make it a new cause of action."

The plaintiffs in this case sought to differentiate the two causes of action now before the Court on the ground that the damages claimed in the second action are only those accruing since the termination of the first. In Straus v. American Publishers' Ass'n., 201 F. 306, the plaintiff replied to the defense of res judicata by pointing out, among other things, that different periods of time were covered. The Court said (page 310) "The fact that evidence of damages in this action may cover a longer period of time than was covered by the action in the state court is immaterial. The thing that was adjudicated between the parties in the state court was that the plaintiffs could recover no damages in respect to copyrighted books at all, be the period of the combination long or short." So, in the present case, the thing that was adjudicated in the 1942 action was that the plaintiffs could recover no damages at all in respect of injuries resulting from the acts of the defendants alleged to have created a monopolistic combination, be the period of the combination long or short. United States v. International Building Co., supra, is not in point. That was a tax case, and the Court followed the well settled rule, appli-

cable in tax cases (admittedly sui generis), that each tax year is the origin of a separate cause of action.

A cause of action under the anti-trust laws consists of a violation of those laws which injures the plaintiff. The allowance of monetary damages is the plaintiff's remedy. Confusion may arise from the general language of some opinions unless one keeps in mind the difference between cases in which the prior judgment, whether by consent or in invitum, is in favor of the plaintiff and cases in which it is against him. In the former class, the judgment is that the plaintiff has a good cause of action, and damages accruing after the judgment, from a continuation of the defendant's wrong, may or may not form the basis of further recovery, depending on the intention of the parties and the scope of the settlement. When, however, the judgment entered is for the defendant, the thing adjudicated is that the operative facts going to make the alleged tort either did not exist or, if they did, did not constitute a legal wrong and, consequently, damages which the plaintiff claims to have suffered by reason of the acts on which his complaint was based, no matter when, cannot constitute a new cause of action.

Again, cases dealing with what constitutes the accrual of a cause of action when the question is the date when the statute of limitations begins to run are to be distinguished. In Williamson v. Columbia Gas and Electric Corp., 186 F. 2d 464, a case involving res judicata, the Court through Judge Goodrich, pointed out that "In a civil conspiracy suit each invasion of plaintiff's interest resulting from the conspiracy creates a new cause of action when the question is the application of the bar of the statute of limitations * * *. We do not think that the definition of 'cause of action' in these cases is controlling on the question before us. The determination of the meaning of 'cause of action' for purposes of deciding whether or not a person has slept on his rights is of little aid in deciding whether a prior judgment is a bar to the present action."

3. It is settled beyond question that a judgment, not void, is not subject to collateral impeachment as long as it stands unreversed and in force, and the rule against collateral attacks applies equally to judgments by consent. Of course, if the judgment is void, it is no judgment, and its validity may be questioned by anyone in any proceeding.

The allegation of the complaint that the plaintiffs entered into the settlement, as the result of which the judgment was entered, "against their will and only because they believed that if they refused to enter into the agreement they would be forced to abandon their business altogether" is insufficient to avoid the effect of the judgment as res judicata.

Duress may, under certain circumstances, render a contract void, rather than merely voidable. Even if it be assumed (what is more than doubtful) that a judgment entered as the result of such void contract would itself be void, nevertheless, to make the contract void, the duress must be such that the party under compulsion "does not know or have reason to know the nature of the transaction to which he apparently manifests assent, or is a mere mechanical instrument without directing will in performing the acts apparently indicating assent." Restatement, Contracts, Sec. 494.

This complaint alleges nothing of the sort. These plaintiffs had brought their action a year before the entry of the judgment which terminated it, asking, among other things, for an injunction which, if granted, would have effectively put an end to the defendants' power to damage the plaintiffs' business, as well as for damages in treble the amount of their losses. If their complaint was well founded, a complete remedy was within their grasp. Reading the complaint, one is forced to the conclusion that, unless the plaintiffs believed either that they could not prevail in the action or that the Court was incapable of granting relief, they must have settled because they found it more advantageous to accept a license than to pursue their action. They were represented by counsel and consummated the settlement by consenting to a judgment against themselves. The fact that

a party, for whatever reason, finds that the advantages of a settlement outweigh the advantages of pursuing the law suit does not constitute duress. Considerations unconnected with the subject matter of the suit, including the business situation of the parties and economic pressures, enter into most settlements, and there are hardly any of them that could not be attacked on the same kind of grounds that the plaintiffs here allege. In Rector v. Suncrest Lumber Co., 52 F. 2d 946, the Court declined to consider a plea of duress based on far more substantial grounds than those here asserted. The allegation of duress is wholly insufficient to form any basis on which the Court could hold the judgment void, and the plea is merely an attempt to attack it collaterally.

4. The plaintiffs also contend that the judgment in the 1942 action was void because the agreement upon which it was entered was against public policy. This question was dealt with in Suckow Borax Mines Consol. v. Borax Consolidated, 185 F. 2d 196, and I subscribe to the view of the Court of Appeals in that case, stated as follows: "We are not aware of any principle of law which requires private monopolists to be treated in any different fashion than other tort feasors in the matter of entering into binding private settlement agreements arising out of demands against them for damages. Such settlements in no wise obstruct possible criminal prosecutions which might be instituted by the Government, nor do they defeat the Congressional purpose of allowing private claimants in this class of actions the right of redress of their grievances in our courts. We cannot and should not characterize the act of appellees in entering into a voluntary 'peace pact' with appellants as an illegal or 'overt act'." It will be noted that in the Suckow case, supra, the Court was dealing with a release and not, as here, with the formal adjudication of a court of competent jurisdiction. Even if, in the present case, we could completely forget that a judgment had been entered and look only at the release and contract, it is certainly an extraordinary point of view

which would allow one participant in an illegal combination to benefit from the illegality of the scheme into which he has entered, in a proceeding which he has brought against other parties to the transaction. Sola Electric Co. v. Jefferson Co., 317 U. S. 173, cited by the plaintiffs, presented an entirely different situation. That decision holds simply that a party to an illegal patent license contract can plead its illegality when the other party, the licensor, sues to enforce it. Here the plaintiffs, in order to obtain threefold damages for a tort which they condoned and invited, plead the illegality of the arrangement which they entered into.

5. The defense of res judicata is available to those defendants in the present suit who were not joined in the 1942 action. In Bruszewski v. United States, 181 F. 2d 419, the Court pointed out that where "res judicata is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts have * * * enlarged the area of res judicata beyond any definable categories of privity between the defendants." The only question is whether the relationship between all the defendants is close enough to make it a fair and proper application of the policy of the law that there should be an end to litigation. I have no doubt that the relationship of the defendants in this case, taking into consideration the allegations of the 1942 complaint, is close enough to bring them all within the scope of the doctrine of res judicata.

In view of the ruling that the 1942 judgment is res judicata of the present action, I have not thought it necessary to deal with the doctrine of collateral estoppel which does not come into play unless the second suit is for a cause of action different from the first, or the issue of estoppel in pais based upon the plaintiffs' accepting, renewing and still retaining, without offering to surrender, their license from National Screen as well as their release and acknowledgement of the validity of the producer defendants' licenses to National Screen.

STIPULATION IN CIVIL ACTION NO. 2472.

It is stipulated by all parties that the plaintiffs Exhibitors Poster Exchange, Inc. and Poster Exchange, Inc. shall be dropped as parties from the above-entitled action with the same effect as though not originally named as such and that the action shall be dismissed with prejudice.

Dated April 26, 1943.

* * * * * * * *

ORDER IN CIVIL ACTION NO. 2472.

AND NOW, April 26th, 1943, in accordance with the foregoing stipulation of all of the parties, it is ordered that

1. The plaintiffs Exhibitors Poster Exchange, Inc. and Poster Exchange, Inc. are dropped as parties from the above-entitled action with the same effect as though not originally named as such.

2. The action is dismissed with prejudice.

J. CULLEN GANEY,
J.

SUPPLEMENTAL APPENDIX.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 2472.

ALLIED POSTER & SUPPLY CORPORATION, FRANK H. BOWEN, individually trading as, MID-WEST POSTER SERVICE, MARTIN BRAVERMAN and SAUL MALISOW, co-partners, trading as INDEPENDENT POSTER EXCHANGE, ADOLPH COHN, individually trading as CENTER POSTER EXCHANGE, EXHIBITORS POSTER EXCHANGE, INC., INDEPENDENT ADVERTISING SERVICE, INC., JACK JUDD, individually trading as JACK JUDD THEATRE POSTER SERVICE, CHARLES LAWLOR and MITCHELL PANTZER, co-partners, trading as INDEPENDENT POSTER EXCHANGE, HYMAN NEGRIN and MORRIS NEGRIN, co-partners, trading as CONSOLIDATED POSTER SERVICE, MORRIS J. LIPP, individually trading as MID-WEST POSTER EXCHANGE, GREGORY NOTARIANORI, individually trading as EXHIBITORS POSTER SERVICE, POSTER EXCHANGE, INC., and BEN SAMPLINER and BEN SIEGEL, co-partners, trading as THEATRE ADVERTISING COMPANY,

VS.

NATIONAL SCREEN SERVICE CORPORATION, LOEW'S, INCORPORATED, PARAMOUNT PICTURES, INC., and RKO RADIO PICTURES, INC.

COMPLAINT.

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The Plaintiffs above named bring this civil action against the defendants above named and complain by reason of the following facts:

1. This action is brought under the Act of Congress of October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies," as amended, commonly known as the Clayton Act, and the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

2. The alleged unlawful acts and violations hereinafter described have been and are conceived, carried out and made effective, in part, within the Eastern District of Pennsylvania, and many of the unlawful acts done in pursuance thereof have been performed, by the defendants within said district. The interstate commerce and trade hereinafter recited is carried on, in part, within the said district. All of the defendants, either are inhabitants of or have agents and transact business within the said district.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.

4. The plaintiffs herein are:

(a) Allied Poster & Supply Corporation, a corporation duly organized under the laws of the State of New York, and transacting business in New York and New Jersey

(b) Frank H. Bowen, individually trading as Mid-West Poster Service, and transacting business in Missouri, Kansas, Nebraska, Oklahoma and Arkansas.

(c) Martin Braverman and Saul Malisow, co-partners, trading as Independent Poster Exchange, and transacting business in Minnesota, Montana, Wisconsin, Iowa, and North and South Dakota.

(d) Adolph Cohn, individually trading as Center Poster Exchange, and transacting business in New York and New Jersey.

(e) Exhibitors Poster Exchange, Inc., a corporation, duly organized under the laws of the State of Louisiana, and transacting business in Louisiana, Mississippi, Alabama and Arkansas.

(f) Independent Advertising Service, Inc., a corporation duly organized under the laws of the State of Ohio, and transacting business in Ohio, Kentucky, West Virginia and Indiana.

(g) Jack Judd, individually trading as Jack Judd Theatre Poster Service, and transacting business in Pennsylvania, and West Virginia.

(h) Charles Lawlor and Mitchell Pantzer, co-partners, trading as Independent Poster Exchange and transacting business in Pennsylvania, Delaware and New Jersey.

(i) Morris J. Lipp, individually trading as Mid-West Poster Exchange, and transacting business in Illinois, Indiana and Michigan.

(j) Hyman Negrin and Morris Negrin, co-partners, trad-

ing as Consolidated Poster Service, and transacting business in New York and New Jersey.

(k) Gregory Notarianori, individually trading as Exhibitors Poster Service, and transacting business in Colorado, Nebraska, New Mexico and Wyoming.

(l) Poster Exchange, Inc., a corporation duly organized under the laws of the State of Georgia and transacting business in Georgia, Alabama, Florida, South Carolina and Tennessee.

(m) Ben Sampliner and Ben Siegel, co-partners, trading as Theatre Advertising Company, and transacting business in the District of Columbia, Maryland and West Virginia.

5. The defendant, National Screen Service Corp., is a New York Corporation, and will hereinafter be referred to as National. Said defendant, National, has an agent and transacts business in the Eastern District of Pennsylvania.

6. Loew's, Inc., is a Delaware Corporation and is engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers and individually as Loew's.

7. Paramount Pictures, Inc., is a New York corporation engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of

Pennsylvania, and is hereinafter included in the reference defendant-producers, and individually as Paramount.

8. RKO Radio Pictures, Inc., is a Delaware corporation engaged in interstate commerce directly and through wholly owned and controlled subsidiary corporations in the production, distribution and exhibition of motion pictures and standard accessories accompanying the same; it has an agent and transacts business in the Eastern District of Pennsylvania, and is hereinafter included in the reference defendant-producers and individually as RKO.

9. All of the aforesaid plaintiffs are engaged in the area specified, respectively, in leasing and selling to exhibitors of motion picture films, standard accessories, hereinafter more particularly described. These are manufactured and issued by the defendant producers, so that motion picture exhibitors, exhibiting the pictures produced and distributed by the defendant producers, may advertise to the public the stars, featured players and scenes suggesting the desirability of viewing the particular picture in question.

10. Accompanying each individual feature picture produced and distributed by the defendant-producers, is a series of special drawings, pictures, photographs, lithographs and advertising material and posters, which are created by the defendant producers for the purpose of enabling motion picture exhibitors to more successfully attract public patronage to the individual pictures of the defendant producers. Such material is made in 8 varying sizes, to wit: 1 sheet, 3 sheet, 6 sheet, 24 sheet, 8 x 10 stills, 11 x 14 photos (in sets of 8), 22 x 28 photos and 14 x 36 insert cards and are collectively referred to in the industry as "standard accessories." The said "standard accessories" are vital and essential in attracting patronage for the profitable exhibition of the picture for which they are created.

11. The defendant-producers are engaged inter alia in the production and distribution of motion pictures in the United States, including Pennsylvania, Illinois, New York, Colorado, Louisiana, Ohio, Minnesota, and the other states wherein the various plaintiffs reside and conduct their business.

12. The defendant-producers are all engaged in the distribution of motion picture film in interstate commerce throughout the United States, and in connection therewith, they cause, procure and secure the shipment of the prints of such film from California, New York and New Jersey to film exchanges in some thirty-two key cities including the cities of Philadelphia, Pa.; Chicago, Ill.; Denver, Colorado; Pittsburgh, Pa.; New Orleans, La.; Cincinnati, Ohio; and Minneapolis, Minnesota, all in the United States, for delivery to exhibitors in those states and nearby states.

13. In connection with and in furtherance of said trade and commerce, and in order to appeal to the public and induce persons to attend motion pictures and to see their motion pictures in particular, the defendant-producers, Paramount and RKO did until about February of 1940 and Loew's did until about March of 1942, and to the best of plaintiffs' information and belief, do now employ a special staff of advertising men and artists to prepare standard accessories, special drawings, pictures, photographs, lithographs, posters, display signs, press sheets and other advertising material and accessories, for the purpose of announcing to the public its motion pictures and the stars and featured players appearing in them.

14. The defendant-producers provide in all of their license agreements with exhibitors, that the exhibitors shall advertise and announce their pictures in a particular manner and shall otherwise adhere to the form of announcement contained in the advertising material prepared and issued

by the defendant-producers in respect to each of their pictures.

15. Most of the contracts between the exhibitors and the defendant-producers provide in effect that standard accessories and advertising material used by exhibitors in connection with the exhibition of said motion pictures, must be leased from or through the defendant-producers and their subsidiaries.

16. In spite of said contractual provisions, the defendant-producers did at all times prior to February of 1940, as to Paramount and RKO and March of 1942 as to Loew's, lease or sell to each exhibitor to whom it licensed a picture, such of its advertising matter and standard accessories as he did from time to time require, or did sell the same to the defendant National and other independent poster exchanges throughout the United States who in turn sold or leased the same together with other advertising materials to exhibitors.

17. The defendant-National is a corporation engaged in the preparation and distribution of advertising materials, art work, photographs, display signs and posters, and advertising trailers, and maintains branch offices and distribution centers throughout the United States, in 31 cities, including Philadelphia, Pa.; Chicago, Ill.; Denver, Colorado; Pittsburgh, Pa.; New Orleans, La.; Cincinnati, Ohio; Minneapolis, Minn., and the other cities wherein the plaintiffs conduct their business for delivery of said advertising material, etc., to exhibitors in those states and nearby states.

18. The defendant-National now has and for several years last past has had the exclusive right to distribute the trailer announcements of motion pictures produced by

several of the major producers of motion pictures including the trailers of the defendants Paramount and RKO.

19. Prior to February of 1940, the defendant-producers, Paramount and RKO, prepared and distributed their standard accessories and advertising material either directly to the exhibitors to whom they licensed pictures, by sale or lease, or sold the same to certain independent poster exchanges who distributed and leased the same with other advertising materials to the exhibitors under certain contracts existing between the exhibitors and such poster exchanges.

20. Prior to February of 1940, there existed throughout the United States, in addition to the defendant-National and its subsidiaries, no less than 25 independent poster exchanges who arranged and distributed the standard accessories and advertising material of the defendant-producers to the exhibitors, in competition with the defendant-National, and who were able to secure the said materials from the defendant-producers, Paramount and RKO, at prices and under terms and conditions which were equally as favorable as those accorded by the said defendant-producers to the defendant-National.

21. In December of 1939, the defendant-National caused to be created and organized, a subsidiary corporation known as Advertising Accessories, Inc., wholly owned or controlled by the said defendant-National.

22. Thereafter, in February of 1940, the said Advertising Accessories, Inc., did negotiate and secure a contract from the defendants, Paramount and RKO, which provided that Advertising Accessories, Inc., be constituted the exclusive distributors of the standard accessories, prepared by said defendants, Paramount and RKO, for the purpose of pub-

licizing the motion pictures which they produced. The said contracts were for a five-year term.

23. At the time of and prior to the negotiation of said contracts, the defendant-producers well knew that Advertising Accessories, Inc., and its parent corporation, National, intended the said contracts to be a step in a general illegal scheme for monopolizing the trade in standard accessories and advertising materials for motion pictures produced by the defendant-producers and other major producers of motion pictures. In entering into the said contracts, the said producer-defendants did, having knowledge of the activities herein recited, entertain the equally illegal purpose of aiding the consummation of said monopoly and did by entering into said contract, in fact, aid the consummation of said conspiracy and plan to monopolize.

24. At or about the same time the said defendant-National by and through its subsidiary, Advertising Accessories, Inc., negotiated with the owners of the said independent poster exchanges hereinbefore referred to, with the purpose of purchasing their assets and good-will and with the express purpose of consolidating the right to distribution of standard accessories and advertising material in its own hands, and in furtherance of its determination to monopolize said trade and commerce.

25. Most of these independent poster exchanges were members of an association known as the National Poster Service Association.

26. At or about the same time the defendant-National by or through its wholly owned subsidiary Advertising Accessories, Inc., did negotiate with other major producers of motion pictures in an effort to secure similar exclusive distribution contracts. Such negotiations were with Universal Pictures, Inc., and Columbia Pictures, Inc., and sub-

sequently with Twentieth Century Fox Film Corporation and Warner Bros. Pictures, Inc.

27. Until the date of this complaint, these negotiations with Universal, Columbia, Fox and Warners have not been consummated.

28. On or about the middle of February, 1940, the defendant-National through its subsidiary Advertising Accessories, Inc., did nevertheless, with the purpose of intimidating the independent poster exchanges into making a sale of their assets to Advertising Accessories, Inc., announce that exclusive contracts had been made with Universal and Columbia, and that exclusive contracts were made with all the other distributors of motion pictures, and did threaten to institute suits against them which would otherwise impair their ability to continue in business.

29. At an annual meeting held in February of 1940, the majority of the members of the said association as a result of the aforesaid acts, agreed to sell their assets to Advertising Accessories, Inc., and subsequent thereto the defendant-National by and through its subsidiary Advertising Accessories, Inc., acquired the assets contracts and good-will and employees of all of the said independent poster exchanges.

30. On or about the date of these transactions, the defendant-National inaugurated, has since actively pursued and is now engaged in enforcing and maintaining a policy and practice whereby it intends to acquire the exclusive distribution privileges of all motion picture advertising matter prepared and distributed by all the producers of motion pictures, and the acts herein recited are all part of and in pursuance of said plan and policy.

31. Thereafter, to wit: during July of 1941, the defendant-National absorbed its subsidiary Advertising Acces-

sories, Inc., and took over its contracts with the said defendant-producers.

32. Shortly after the absorption of the then existing independent poster exchanges, by National and/or its subsidiaries, most of the plaintiffs herein were incorporated and created for the purpose of engaging in the sale, leasing and distribution of standard accessories used and useful in the advertising of motion pictures, produced and distributed by the defendant-producers and other producers.

33. During the time that the plaintiffs have been so engaged they have made contracts with a large number of exhibitors to provide them with the standard accessories, advertising material and posters prepared by the defendant Loew's and other producers and by reason of the excellent and satisfactory services rendered by said plaintiffs a valuable asset of good will has been created and maintained.

34. Since February of 1940 from time to time, the various plaintiffs requested the defendant-National to sell or lease to them the standard accessories and advertising posters used in publicizing pictures produced by Paramount and RKO and required by the said plaintiffs in the maintenance of their business. This request has been uniformly refused by National throughout the country although similar requests from several favored independent poster exchanges, not plaintiffs herein, and from operators of large theatre circuits have been granted regularly.

35. Since February of 1940, from time to time, the various plaintiffs requested the defendant-producers, Paramount and RKO to sell, lease or make available to them the standard accessories and advertising posters used in publicizing pictures produced by them, and required by the said plaintiffs in the maintenance of their business. This request has been uniformly refused by the defendant-

producers, Paramount and RKO, although similar requests from operators of large theatre circuits have been uniformly granted.

36. The plaintiffs nevertheless still have been able until March 1st of 1942 to secure, buy or lease the standard accessories and advertising posters, used in publicizing pictures, produced by other major producers of motion pictures, including the standard accessories and advertising posters and material of Loew's, producers of Metro-Goldwyn Mayer Pictures.

37. Until March of 1942, the plaintiffs continued to lease and service to exhibitors throughout the United States, the said standard accessories and advertising posters which they were able to procure and other advertising material, in competition with the defendant National, except that the plaintiffs were unable to adequately supply to their customers the standard accessories and advertising posters of Paramount and RKO.

38. The plaintiffs' customers were therefore obliged to seek the standard accessories and advertising posters and material used by them in publicizing Paramount and RKO pictures from the defendant-National and could secure the same adequately from no other source.

39. In furtherance of the conspiracy and plan to monopolize the trade in standard accessories and advertising posters and material, the defendant-National frequently refused to sell or lease to the said plaintiffs' customers, the standard accessories and advertising material of Paramount and RKO which they desired, unless the said plaintiffs' customers would agree beforehand to purchase or lease for all of their films exhibited, standard accessories and advertising materials (including advertising trailers distributed by it), from the defendant-National.

40. As a result of the monopolistic condition existing on Paramount and RKO standard accessories and advertising material, in the areas wherein the parties operated, exhibitors of motion pictures and the plaintiffs herein, were deprived of access to a free, open and untrammelled market in which they could buy the said standard accessories and advertising material.

41. On the contrary, the said exhibitor customers of the plaintiff were required and still are required to pay unreasonable and arbitrary prices for the leasing of the said standard accessories and advertising material, and were required by the defendant-National to abide by unreasonable and arbitrary rules with respect to credit for return of said material; and in many cases were threatened and coerced into agreeing to purchase all of their standard accessories and advertising material from the defendant-National before they could get any of the said standard accessories of the defendant-producers, Paramount and RKO, all in accordance with and in pursuance of its original unlawful plan and conspiracy entered into with the defendant producers.

42. During the latter part of 1941, the defendant-National did, in furtherance of its conspiracy to monopolize the trade in standard accessories and advertising materials, used and useful in the publicizing of motion pictures, enter into negotiations with Loew's, Inc., producers of M.G.M. pictures to secure from said defendant Loew's the right to exclusive distribution of its standard accessories and poster advertising material prepared or made available by said defendant Loew's.

43. At the time of the negotiation of the said contract, the defendant Loew's well knew, that the defendant-National intended to acquire this exclusive privilege as a step in a general illegal scheme to monopolize the trade in

standard accessories and advertising materials for motion pictures produced by the defendant-producers and other major producers of motion pictures.

44. Notwithstanding said knowledge, and the further knowledge of the fact that the defendant-National already had embarked upon its illegal scheme to monopolize the said trade, by having secured exclusive contracts of distribution from the defendants Paramount and RKO and notwithstanding that the defendant Loew's well knew of the other acts of the defendant-National hereinbefore recited and that the defendant-National had been charging and had within its power the ability to charge arbitrary prices for the materials for which it had the right of exclusive distribution, and that it intended to do the same with Loew's product; the said defendant Loew's did enter into a contract with the defendant-National, wherein the latter defendant was granted the exclusive right to distribute the standard accessories and advertising material produced or made available by said defendant Loew's, throughout the United States, said privilege and right to run from March 1, 1942.

45. The plaintiffs allege that the said defendant Loew's did at the time of entering into said contract intend and propose to aid the consummation of the illegal conspiracy to monopolize the trade in standard accessories and advertising materials, used and useful in the publicizing of motion pictures, hereinbefore recited, and did in fact intentionally accede to and aid the said conspiracy and plan to monopolize.

46. Since March 1, 1942, the defendant-National and the defendant Loew's although requested to do so by the plaintiffs herein, have refused to sell or lease to the plaintiffs herein at any price or under any terms standard accessories and advertising materials produced and distributed

by them and used in publicizing motion pictures produced by Loew's.

47. It will thus be impossible in the future for the plaintiffs herein to adequately provide their customers with standard accessories and advertising posters or material, produced and distributed by the said defendant producers.

48. Of the business done by the plaintiffs herein, in standard accessories and in advertising posters, the sale and leasing of standard accessories and posters used and useful in publicizing the motion pictures produced by the defendant Loew's represents between 20% and 33% of the total business done in all standard accessories and posters and the business done by the defendant-National in standard accessories and advertising posters, used and useful in publicizing the motion pictures produced by the defendants, Paramount and RKO represents 25% and 15% respectively of the total business done in all standard accessories and posters.

49. In the course and conduct of its business, as hereinbefore recited, the defendant-National, since the making of the agreements with Paramount and RKO and more intensively since the agreement with Loew's has been and now is discriminating in favor of certain exhibitors against other exhibitors, who still buy some of their advertising needs from the plaintiffs, by contracting to give and furnish and by giving and furnishing, certain prices, services and facilities in connection with the handling, sale and lease of its products so purchased, not accorded to all such exhibitors on proportionately equal terms; all this with the intention of eliminating the plaintiffs as competitors, and in pursuance of its original plan and conspiracy.

50. By and pursuant to the policy and practises above described the defendant-National has made its service con-

tracts subject to the condition and is making and continuing such contracts and making sales in the course of its said business, on the condition and with the agreement or understanding that the purchasers or lessees, many of whom are also plaintiffs' customers shall not use, lease or buy the products of the plaintiffs who are the competitors of the defendant-National.

51. The effect of such contracts, sales and leases, and such conditions, agreements and understandings, has been and will continue to be to lessen and eventually eliminate competition or tend to create a monopoly in the distribution, lease and sale of motion picture advertising material and standard accessories in trade or commerce among the several states in accordance with a conspiracy so to do, and such contracts, sales and leases are, therefore, unlawful and in violation of the laws of the United States.

52. The defendant-National, by printed bulletins, correspondence, personal calls by its field representatives, and through its distributing branches, has notified all purchasers and lessees that it will increase prices, decrease return credits and in some cases terminate its service, if the exhibitor continues or commences to use, buy or lease the advertising materials supplied by its competitors, the plaintiffs herein, but will give more advantageous terms to purchasers and lessees who will discontinue the services of the plaintiffs.

53. The purpose and result of this policy and practice has been and will be to persuade, intimidate and coerce many of the plaintiffs' customers to cancel similar service contracts with the plaintiffs, and to refuse to deal in, purchase or lease the products and services of the said plaintiffs.

54. As a result of the said unlawful combination, con-

spiracy, acts and restraints of the defendants, the plaintiffs have suffered great loss and damage as follows:

(a) Plaintiffs are unable to adequately secure the standard accessories, advertising posters and material of the defendant producers, Paramount, RKO and Loew's;

(b) Plaintiffs have been deprived of their right and ability to profitably buy and lease or sell the products necessary to the conduct of their business in a free, competitive and untrammelled market;

(c) The patronage of the plaintiffs' customers has been greatly reduced and will be further diminished;

(d) The damages directly sustained to date by each of the plaintiffs by reason of the said wrongful acts of defendants is a sum in excess of the amounts set forth opposite the name of each plaintiff in the following schedule:

Allied Poster & Supply Corporation	$4,000.00
Frank H. Bowen, individually trading as Mid-West Poster Service	2,000.00
Martin Braverman and Saul Malisow, co-partners, trading as INDEPENDENT POSTER EXCHANGE	4,200.00
Adolph Cohn, individually trading as CENTER POSTER EXCHANGE	3,000.00
Exhibitors Poster Exchange, Inc.	1,100.00
Independent Advertising Service, Inc.	2,000.00
Jack Judd, individually trading as JACK JUDD THEATRE POSTER SERVICE..	4,400.00
Charles Lawlor and Mitchell Pantzer, co-partners, trading as INDEPENDENT POSTER EXCHANGE	1,500.00
Hyman Negrin and Morris Negrin, co-partners, trading as CONSOLIDATED POSTER SERVICE	1,000.00

Morris J. Lipp, individually trading as MID-WEST POSTER EXCHANGE	2,320.00
Gregory Notarianori, individually trading as EXHIBITORS POSTER SERVICE	5,000.00
Poster Exchange, Inc.	4,000.00
Ben Sampliner and Ben Siegel, co-partners, trading as THEATRE ADVERTISING COMPANY	1,500.00

55. Each and all of the said illegal acts and practices of the defendants tend to restrain and obstruct inter-state trade and commerce in violation of the Sherman Anti-Trust and Clayton Acts.

56. The defendants have threatened to continue their illegal acts and practices and unless such illegal acts and practices are restrained, the plaintiffs will suffer further immediate and irreparable damages.

WHEREFORE, Plaintiffs pray:

(a) That summonses issue directed to each of said defendants commanding them to appear herein, and answer the allegations contained in this complaint and to abide by and perform such orders and decrees as the Court may make in the premises.

(b) That preliminarily until final hearing and perpetually thereafter, the combination and conspiracy of the defendants, each with the other, in restraint of interstate trade and commerce in the sale and lease of standard accessories, advertising posters and material used and useful in the publicizing of motion pictures, be declared illegal and violative of the Sherman Anti-Trust and Clayton Acts.

(c) That preliminarily until final hearing and perpetually thereafter, the discrimination by the defendants Para-

mount, RKO and Loew's in favor of the defendant-National and against the plaintiffs be declared illegal and violative of the Sherman Anti-Trust and Clayton Acts.

(d) That preliminarily until final hearing and perpetually thereafter, the discrimination by the defendant-National against the plaintiffs' customers be declared illegal and violative of the Sherman Anti-Trust and Clayton Acts.

(e) That preliminarily until final hearing and perpetually thereafter, the defendants herein and each of them and each and all of their respective parent, associated and subsidiary corporations and each and all of their respective officers, directors, agents, servants and employees, and all persons acting or claiming to act on their behalf, or any of them be enjoined and restrained from continuing, directly or indirectly, expressly or impliedly, the attempts at monopolization, the monopolies and all restraints of said interstate trade and commerce, and all discriminatory prices and practices in the distribution of standard accessories, advertising posters and material used and useful in the publicizing of motion pictures, described herein and from entering into, engaging in, accomplishing or consummating directly or indirectly expressly or impliedly, any monopolies or restraints of interstate trade or commerce similar to those alleged herein to be illegal;

(f) That preliminary until final hearing and perpetually thereafter, the defendants herein and each of them and each and all of their respective parent, associated, and subsidiary corporations and each and all of their respective officers, directors, agents, servants and employees and all persons acting or claiming to act on their behalf, or any of them be enjoined and restrained, directly or indirectly, expressly or impliedly from imposing or enforcing upon the plaintiffs or any of them, or otherwise engaging in, any and all of the unfair trade and illegal practices de-

scribed herein, including the licensing by Paramount, RKO and Loew's to National of the exclusive right and privilege of distributing the standard accessories, advertising posters and material used and useful in the publicizing of their motion pictures.

(g) That preliminarily until final hearing and perpetually thereafter, the defendants, Paramount, RKO and Loew's National, and each of them, and each and all of their respective parent, associated and subsidiary corporations and each and all of their respective officers, directors, agents, servants and employees and all persons acting or claiming to act on their behalf or any of them, be ordered and directed to establish and maintain throughout the United States and particularly in the cities and state wherein the plaintiffs operate, a free open and untrammelled market available to the plaintiffs for the sale and leasing of standard accessories, advertising posters and material used and useful in the publicizing of motion pictures and to permit plaintiffs the right and opportunity to procure under fair competitive conditions the standard accessories, advertising posters and material which they require in the lawful conduct of their business.

(h) That the plaintiffs shall have such other and further relief as the court shall deem just and proper;

As hereinbefore recited, the damages directly sustained by the plaintiffs, by reason of the said wrongful acts of the defendants is as set forth in the schedule contained in paragraph 54 (d); and under the provisions of the Clayton Act plaintiffs are entitled to recover the aforesaid damages three-fold, together with the costs of suit, including a reasonable attorney's fee.

WHEREFORE, the Plaintiffs claim to recover from the defendants the total sum of $72,040, with interest thereon

from the date of the filing of this suit, together with the costs of suit including a reasonable attorneys' fee.

MICHAEL H. EGNAL,
2004 North American Bldg.,
Broad & Sansom Sts.,
Philadelphia, Pa.,
Attorney for Plaintiffs.

Dated:

SYDNEY C. ORLOFSKY,
Of Counsel.

[fols. 107-116] IN UNITED STATES DISTRICT COURT

EXHIBIT "I" TO ANSWER

Copy

National Screen Service Corporation

Pre-vues Accessories

Herman Robbins, President

630 Ninth Avenue, New York 19, N. Y.

Office of Arthur B. Krim, Treasurer and General Counsel

Branches:

Albany
Atlanta
Boston
Buffalo
Charlotte
Chicago
Cincinnati
Cleveland
Dallas
Denver
Des Moines
Detroit
Indianapolis
Kansas City
Los Angeles
Memphis
Milwaukee
Minneapolis
New Haven
New Orleans
New York
Oklahoma City
Omaha
Philadelphia
Pittsburgh
Portland
St. Louis
Salt Lake City
San Francisco
Seattle
Washington

Studios:

Hollywood
New York

March 7, 1946

Mr. Mitchell Pantzer
Independent Poster Exchange
1323 Vine Street,
Philadelphia, Pa.

DEAR MR. PANTZER:

This will confirm our understanding, as follows:

(1) The term of our contract of April 21, 1943 is extended for an additional period of five (5) years beginning May 1, 1946 and ending April 30, 1951.

(2) National Screen shall have the right at its option to change the prices of the accessories listed in Schedule A for the fourth and fifth years of this agreement to conform to corresponding changes in the manufacturing cost to National Screen of the said accessories. Notice of such change will be given to you at least three months prior to the end of the third year of this agreement.

(3) The words "ten years" shall be substituted for the words "seven years" appearing in the second sentence of paragraph "SEVENTH" of the contract.

(4) Except for the foregoing, all the other terms, covenants and conditions of our said contract shall continue in full force and effect.

Very truly yours, National Screen Service Corporation, by Arthur B. Krim s, Treas.

Accepted: Independent Poster Exchange By Mitchel Pantzer s.

• • • • • • •

[fol. 111] IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF DEPOSITIONS

Pre-trial Examination of Charles Lawlor January 20, 1953

[675]*

By Mr. Nizer:

Q. What happened to this action that you started in 1942?

[676]

A. It was settled. It was settled by National Screen and ourselves.

Q. And what was the nature of the settlement?

A. Simply the supply of the accessories which we have been getting ever since.

Q. When you say "simply" you mean that there was a contract, a sub-license contract, which has now been marked as an exhibit in your present suit?

A. Yes.

Q. When you say it was settled do you mean that the action was terminated by legal documents put on file; stipulations, a discontinuance with prejudice—do you know about that or don't you?

A. Well, we came to an agreement and that is on the record.

* * * * * * *

[fol. 112] [676]

Q. Well, did you execute in addition to whatever

[677]

documents were filed in court ending the entire controversy? The controversy was ended, wasn't it, at that time?

A. At that time, yes.

* * * * * * *

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* Numbers in brackets refer to page numbers of original transcript.

[677]

Q. Well, let me show you this paper marked "General Release, Charles Lawlor and Mitchell Pantzer, co-partners trading as Independent Poster Exchange to National Screen Service Corporation." Do you see that?

A. Yes.

Q. And now I show you the bottom of that sheet. You can look at the whole thing, of course. I ask you if that is your signature at the bottom.

A. Yes.

[678]

Q. Is that Mr. Pantzer's signature?

A. I believe it is.

* * * * * * *

[678]

Q. You consulted with your counsel, Mr. Egnal and Mr. Orlofsky, and so did Mr. Pantzer before you settled this suit, didn't you?

A. Yes.

Q. And you discussed the various terms of settlement which were negotiated over quite a period of time?

A. Yes.

Q. Do you recall how many months the settlement nego- [fol. 113] tiations went on?

A. No.

Q. Would you recall whether it was weeks or months?

A. All I can say is that it was more than weeks.

Q. And during that time your counsel would report to you on the various things he was asking and what was being given and it was a matter of give-and-take all the time, is that right?

[679]

A. Yes.

Q. Then you finally came to a complete agreement as to how the suit would be settled and disposed of it completely; there came that time?

A. Yes.

Q. And that time would be, as this release might refresh your recollection, in April of 1943?

A. Yes, probably.

Q. That would be approximately; your recollection I am asking, not for specific dates.

A. About a year.

Q. That would be about a year after the suit was started?

A. Yes.

Q. Now, there was this sub-license agreement—I call it that because I think we have so referred to it before—between National Screen and you and Mr. Pantzer and your [fol. 114] company whereby, as the agreement shows, you were to get supply of all companies and all accessories under those terms as set forth there, is that right?

A. Yes.

Q. And without reading it, you have already told us at the last examination that the prices at which you were to get the accessories under that sub-license

[680]

agreement were considerably lower than the prices you had previously paid to the distributors when you were dealing directly with them, is that right?

A. Yes, we went over that.

Q. Yes. And that is a correct statement without repeating each price of each article, is it not? That is a correct statement?

A. I believe it is.

Why do you say "considerably"? It is not considerable, but it is lower, because in some cases it was equal, as you recall.

Q. Well, very few. In most cases of the important items it was very much——

A. I mean the word "considerably" there is really out of line in view of the very small difference in some cases.

Q. But in the important cases—I think we went over that, too, and I will come back to it if you have any doubts—in the important cases such as for example stills, which are a big item, aren't they, and the 1 sheets, the big items, there was a substantial lower price under the National Screen [fol. 115] sub-license agreement than what you had paid to the distributors, isn't that so?

A. No, I don't think the word "substantial" or "con-

[681]

siderable" is in line there at all.

Q. No? Well, we won't pause too long on it, but just for one or two items.

What was the price you paid for stills to the distributors directly when you dealt with them?

A. It was ten cents.

Q. And what did you pay to National Screen?

A. Eight.

Q. So that would be a difference of two cents on a still?

A. Yes.

Q. And stills are the biggest item that you deal with?

A. Well, they are one of the biggest, yes.

Q. How many thousands of stills do you deal with a year?

A. I don't know. It is in the thousands.

Q. Can you give me an idea whether it is in the tens of thousands?

A. Oh, I don't think it is, no.

Q. Will you be good enough at the next session to give me the annual still business that you do; just quantity, you don't have to break it down in any way. Will you please do that for each year for this period?

A. I think we can do that, yes.

[682]

Q. The quantity that you sold.

A. Yes.

Q. That I think would give it to us.

[fol. 116] A. Rented.

Q. Rented. And if you re-rented it count them each time.

A. Each time, yes.

Q. That is right.

Now, what is the other big item—anyhow, would you say that eight to ten cents on one still, which is what, a 25 per cent differential on price, isn't it? Two to ten? 20 per cent?

Mr. Poul: 20 per cent.

By Mr. Nizer:

Q. 20 per cent differential. Would you say a 25 per cent differential on the price is substantial?

A. I don't know.

Q. You don't know.

Well, give me the 1 sheets. What did you pay to the distributors directly?

A. Fifteen.

Q. And what did you pay to National Screen and what have you been paying under the sub-license agreement when you first made it?

[683]

A. I think it was twelve. Does that agree with you?

Q. I will look it up.

A. I think it was.

Q. All right, let's assume that for the moment.

Would you say that a three-cent differential on a fifteen-cent item is substantial?

A. I don't know.

Q. Would you say it is a considerable differential?

[fol. 117] A. No, I wouldn't say because it is controlled a lot by surrounding situations.

Q. There were some items where the costs were higher, where there was as much a difference as—take a 3 sheet, what did you pay for a 3 sheet to the distributor directly when you bought it from him?

A. Forty-five.

Q. And for the same 3 sheet when you bought it from——

A. Screen?

Q. —Screen under this settlement agreement what did you pay?

A. I think it was forty and forty-five, depending on the company.

Q. Well, with most of them it was five cents less, was it not, per sheet?

A. I think so, yes.

[684]

Q. Would you say that a five-cent differential on a forty-five-cent item is a susbtantial difference?

A. No.

Q. Well, then, I understand what you mean by "substantial."

In any event, the prices are there and you have already testified to it and I won't take you over them again.

A. All right.
Q. They are in the record.
A. Yes.

* * * * * * *

[fol. 118] Q. Coming back to this settlement, you went over all these matters, including the prices, with Mr. Pantzer, and considered the terms of this sub-license agreement, didn't you?
A. Yes.
Q. Before you settled, I mean, of course.
A. Yes.
Q. And it wasn't only the prices, but all the other provisions with respect to when shipment would be made and if National Screen even acquired licenses with other distributors you automatically would get the benefit of the accessories manufactured for those distributors, isn't that so? Your settlement even covered the future?

[fol. 119] [685]

A. Yes. We settled the case, but we didn't do it very happily.
Q. I will come back to your happiness in a minute. Just follow me first on the facts.
You and Mr. Pantzer, what I am asking you now is, went over all of the terms carefully of this sub-license agreement and asked for changes and got improvements and in some cases you didn't get improvements of the terms——
A. Yes.
Q. —of the sub-license agreement, right?
A. Yes.
Q. It was a matter of negotiation, for, as you say, certainly more than weeks, at least months, right?
A. Right.
Q. And in many instances you got further concessions through your counsel and the negotiations that went on, and in some instances you couldn't get further concessions?
A. Yes.
Q. And of course under this sub-license agreement you are not required to take any of the risks of manufacturing the material, are you?
A. No, we weren't.

[686]

Q. You had none of the expense of the art work that goes [fol. 120] into the manufacture, did you?

A. No.

Q. None of the obligations of having factories or labor to manufacture these things or lithographing plants or arrangements, did you?

A. No.

. . . . . .

[687]

Q. My point is, irrespective of the form of it, that you were considering, when you were considering the settlement of this controversy, the fact that National Screen would do all the manufacturing, take all the risks inherent in manufacturing and creating the articles, and then giving you exactly the same product which they had as a result of that process, is that right?

A. Yes, sir.

Q. And also that you would get from National Screen under this license agreement all of these accessories for whatever companies National Screen either then had or would in the future have the rights to make the material, right?

A. Yes, I believe that is right.

Q. And after considering these matters I suppose very carefully with Mr. Pantzer and your counsel before giving up the suit you decided that you would accept these terms

[fol. 121] [688]

as a settlement. Is that right?

A. Yes.

Q. Now, it was then that you signed these documents which we have referred to. One is the release which has been marked, and the other is the stipulations which you authorized your counsel to sign discontinuing the action with prejudice.

A. Yes.

Q. And you did all of that voluntarily after considering the matter carefully?

A. Yes.

Q. Now, the action, the complaint that you filed, sought injunctive *re* relief as well as damages. Do you recall that or would you rather have me show it to you?

Mr. Poul: I will concede for the record that it does

Mr. Nizer: Yes.

By Mr. Nizer:

Q. Mr. Poul tells you that we don't have to stop to read it.

A. All right, that is good enough for me.

Q. Do you recall that Mr. Egnal stated that if the case were not satisfactorily settled to you and Mr. Pantzer that he would attempt to get an injunction, even a temporary

[689]

injunction to stop National Screen from doing the things [fol. 122] that you complained of in that complaint? I won't go into the matters except to say they are in the complaint. Do you recall that?

A. No.

Q. Did not Mr. Egnal at any time report to you that he had written and threatened or warned National Screen that he was going to seek temporary injunction to stop them from doing what he claimed was wrong on your behalf?

A. I don't recall, Mr. Nizer.

Q. You don't recall one way or the other; you mean you have no recollection?

A. That is right.

Q. You do recall that of course you were seeking damages for what you claimed was wrong in this complaint?

A. Yes.

Q. National Screen, of course, had put in an answer stating that it was doing nothing wrong, isn't that so?

A. Yes, I remember that.

Q. There was a dispute in which one side said, "You are doing something wrong," and the other side said, "What we are going is perfectly legal and right."?

A. Uh hu.

Q. Now, it was that controversy in which there was this

[690]

injunctive relief that you were seeking on your counsel's [fol. 123] theories and on your theory, and the damages which you were seeking in the event that you turned out to be right in this dispute; it was those things which you surrendered and gave up and settled and forgot about in order to make the settlement in which you got the sub-license agreement, is that right?

A. Yes.

Q. And that was a business choice that you made as businessmen under your counsel's guidance?

A. Yes. At that time, yes.

Q. Now, from the moment that your suit was withdrawn with prejudice and the release was signed releasing National Screen from any claim whatsoever, from that moment on the sub-license agreement in which you received full supply from National Screen of all the products that it made for itself, went into effect from that moment on, from the date of that settlement, is that right?

A. Yes, that is when it started.

Q. And from that date to the date that you started your new suit your company progressed and made larger profits as the years went on, did it not?

A. Yes.

[691]

Q. Did you ever write any letter—when I say "you", I mean you or Mr. Pantzer for your company, or even your [fol. 124] lawyer for your company—seeking to set aside the settlement in the Federal Court here that you had made? Did you ever do that?

A. I don't know. I am not aware of it.

Q. By "I don't know and I am not aware of it" I take it you mean that so far as you know you never did that?

A. I don't know whether we did or not, Mr. Nizer.

Q. Did you ever start any legal proceedings to set aside the settlement of that first litigation?

A. Not to my knowledge.

Q. Did you ever start any legal proceedings to set aside the release that you had given to National Screen releasing it from all claims of any kind on your part?

A. Not to my knowledge.

Q. At the time that you withdrew your suit and settled it completely to your satisfaction did you expect to sue National Screen again later?

A. We didn't think about it.

Q. Now, you have been receiving the benefits of the settlement of that controversy from the date of the settlement right to this very day, have you not?

Mr. Poul: Don't answer that. I object to that. That is

[692]

pure argument.

I think a great many of your questions very recently have been either argument or mere requests for conclusions.

[fol. 125] Mr. Nizer: I don't think that is an argument, whether he received benefits, but I will try to rephrase it perhaps to satisfy you, Mr. Poul. I will try again.

By Mr. Nizer:

Q. You have already told us that the sub-license agreement made available supplies to you of these accessories of all companies that National Screen either then had contracts with or even later acquired contracts with. That is so, is it not?

A. Yes.

Q. As a matter of fact, that later happened. National Screen after that settlement made contracts with other distributors and you got the benefits of those accessories just the same as you got of those that were in existence at the time you made the settlement, isn't that so?

A. We received material on all companies that were later taken by National Screen.

Q. And at the same prices which we have gone over in

[693]

the contract?

A. Yes, at the agreed rates.

Q. And you have been receiving these materials which I have called the benefits of this contract—those were the benefits of the contract, the fact that you were so supplied [fol. 126] at these prices, isn't that so?

A. Yes.

Q. And you have been receiving those materials at those prices right on from the date of that settlement to the time that you started this suit and even to this day, isn't that so?

A. Yes.

Q. And your grievance——

Mr. Poul: Pardon me. May I hear that question and answer?

(The question and answer were read by the reporter.)

A. Pardon me. I shouldn't have said "yes" to that because the prices underwent an increase since that time, so that isn't precisely true.

By Mr. Nizer:

Q. Well, when I said "under the contract" I meant under the prices that were in the contract at that time and then under a clause of the contract that permitted in the event

[694]

of certain cost increases an increase in that amount. There was later an increase, wasn't there?

A. Yes, that is true.

Q. Now, that increase, incidentally, to your knowledge, from your experience in the business, the increase even at that time of the prices was not as large as the inflationary increases that had occurred at that time, isn't that so?

A. Well, I wouldn't connect this with the general situation at all.

[fol. 127] Q. No, I am not asking you to connect it with anything, either general or specific. All I am saying is from your knowledge of what happened to prices and labor and costs of material the price increase that finally took place to you wasn't in proportion to the larger increases of costs, was it?

A. I don't know.

Q. Well, in any event, to come back to the main question before counsel asks to have the question repeated, your grievance, as we have been examining into it through all these letters, is that the contract that was made, this sub-

license agreement that was made between you and National Screen, you say in some instances is not being lived up to correctly; is that a fair statement of it?

[695]

A. Yes.

Q. You claim that National Screen is breaking its contract by not making deliveries on all occasions as it should. Isn't that your position here?

A. Yes.

Q. Now, when you settled the first litigation in 1943 did that settlement also have the approval of your counsel at that time, Mr. Egnal and Mr. Orlofsky, I take it, those two men?

A. Yes.

Q. And also you authorized them to settle it, that you were satisfied with those terms, did you not? As your counsel, you had to give him authority?

A. Yes, we gave him authorization.

Q. There has never been a quarrel between you and Mr. Egnal, has there?

[fol. 128] A. No.

Q. You were content with his professional services on your behalf?

A. Not necessarily, but we went along.

Q. Well, I am not asking whether anything was necessary, I say you didn't have any grievance against Mr. Egnal's representation of you as a lawyer, he was loyal and faithful to you and followed your instructions, did he not?

[696]

A. Well, let me just say that we weren't completely satisfied with his work, but we finally accepted the agreement.

Q. Well, you paid him for his work?

A. Yes.

Q. In full, in accordance with your agreement with him?

A. Yes, yes, we did.

Q. And when you say you weren't fully satisfied, or you used the phrase before that I wanted to come back to, that you weren't completely happy, or something like that, in

any settlement I take it that each side thinks it is making some sacrifice, isn't that so?

Mr. Poul: I object to that. Don't answer it.

By Mr. Nizer:

Q. Is that what you mean by the phrase "happy"?

[fol. 129] Mr. Poul: Don't answer it.

By Mr. Nizer:

Q. Don't answer it.

A. Well, I don't know.

Q. Have you any idea from any conversations you had with National Screen's representatives whether they were completely happy with this settlement?

[697]

A. I haven't the slightest idea.

Q. In other words, whether one is very happy with the settlement or not each side, it is a give-and-take, it is a compromise, isn't it? Isn't that what you consider a settlement to be, a compromise?

Mr. Poul: Don't answer that.

Mr. Nizer: On what ground?

Mr. Poul: I think that is purely argumentative.

Mr. Nizer: In the light of your pleading—well, I won't argue it. I won't commit the sin that you accuse me of by arguing with you, but I don't think it is improper at all in the light of the issue here.

By Mr. Nizer:

Q. In view of your counsel's objection I won't go into the state of mind of happiness. In any event, it was not against your will that you did this?

A. Yes, we did it against our will.

Q. You did what against you will, Mr. Lawlor?

[fol. 130] A. Agreed to the settlement.

Q. And when you say you did it against your will, just precisely what do you mean by that? Did anybody tell you to do it? Did your lawyer compel you to do it?

[698]

A. No, we were more or less overridden by our other membership in the organization.

Q. You mean that there were—let me see if I understand you. Do you mean that there were other plaintiffs as well as yourself in this suit?

A. Oh, yes.

Q. That is correct, isn't it?

A. Uh hu.

Q. And you mean that the other plaintiffs in the action wanted to go through with the settlement, the same kind of a settlement?

A. Well, let me put it this way, we were overridden.

Q. Please answer my question first before you put it any way.

A. We were overridden——

Q. Answer my question, first.

Mr. Poul: Answer Mr. Nizer's question, first.

The Witness: I am.

By Mr. Nizer:

Q. Listen to my question and then answer me.

[fol. 131] The question is, do you mean that the other plaintiffs wanted to go ahead with the same kind of settlement that you made?

[699]

A. Yes, some of them did.

Q. And there were some who didn't.

A. Some who didn't.

Q. And some who didn't actually go through with it, did they?

A. I am not sure. I am not sure of that. There may have been, there may have been.

Q. That is right. Now, you, therefore, had the choice of either joining the group that didn't want to go through with it or those that did want to go through with it, didn't you?

A. Yes.

Q. And you chose to go through with it?

A. Yes.

Q. And you chose that of your own free will, you and Mr. Pantzer and your lawyer, after consulting and considering the matter, didn't you?

A. Yes.

Q. Now, when you said before "we did it against our free will" did you mean that the fact that other plaintiffs who wanted to go through with the settlement influenced you to do it, persuaded you to do it? Is that what you mean?

A. Well, we were influenced by the majority.

[700]

[fol. 132] Q. You wanted to abide by the——

A. And we were also influenced by our lawyer.

Q. By your lawyer?

A. Yes.

Q. In other words, the majority of the plaintiffs felt that it was a good thing to go through with this settlement?

A. I don't know what they felt or their reasons.

Q. They told you that?

A. But they wanted to sign the agreement.

Q. Well, you assume from that that they thought it was advantageous, don't you?

A. Not necessarily. They were just——

Q. In any event, I won't——

A. (Continuing) They were just desperate to culminate the whole thing, that is about what it amounted to.

Q. And you having a choice not to go through with it wanted to abide by the majority, is that what you mean?

A. Well, our reasons were financial.

Q. Answer my question first. First answer my question.

A. What was it?

Q. Did you hear it?

A. What was it, again?

[701]

Q. Listen to me and it will be much easier to answer the question.

[fol. 133] A. What was it, again?

Q. You wanted to abide by the majority of the plaintiffs who did want to go through with this, that was the persuasion they had upon you?

A. Well, we did.

Q. Yes.

A. We abided by it.

Q. And also by the lawyer who also represented them as well as you.

A. Yes.

Q. That is what you were trying to tell me before?

A. Yes.

Q. Now, nobody, nevertheless, compelled you to do this, did they?

A. No.

Q. And after exercising your best judgment and listening to your lawyer and the other plaintiffs, and listening to the arguments on the other side, you decided you would go along with the majority, is that right?

A. Yes, exactly.

Q. And for years afterwards you accepted the special prices under the sub-license agreement when National

[702]

Screen supplied you with these materials?

A. Yes.

Q. And when they supplied you with them on time and without some of the grievances which you claim and National Screen denies, when there weren't these grievances you were very content, weren't you?

[fol. 134] A. No.

Q. When there were no grievances?

A. No, we were never content.

Q. But you never asked National Screen to cancel that contract, did you, to this day?

A. Well——

Q. Just answer my question. Did you?

A. No, no.

Q. And you always wanted National Screen to continue to serve you under this contract, didn't you?

A. Yes.

Q. And certainly, therefore, you never started any proceeding to terminate the contract; on the contrary, you wanted it lived up to?

A. Yes.

Q. The only time you asserted a grievance is when you thought National Screen wasn't performing the contract in exact accordance with its terms as you felt?

A. Yes.

[703]

Q. And National Screen would write to you and say that it was living up to the agreement and that it was doing the best it could under the circumstances; that was the nature of the general controversy, wasn't it?

A. Yes.

Q. So it was really a dispute as to whether the contract [fol. 135] was or wasn't being lived up to in accordance with its terms, right?

Mr. Poul: I object to that, don't answer that.

(Discussion off the record.)

By Mr. Nizer:

Q. Did Mr. Egnal continue to represent you after this settlement was effected on anything else, or in your business?

A. No.

Q. He was retained solely for this litigation?

A. Yes. I don't recall if he was used for a slight time after that, but if he was it was only for a very short while.

Q. Now, even for a very short while what was the nature of his representation? I don't want to know the details.

A. I don't recall.

[704]

Q. He just represented your company for a little while ——

A. Yes.

Q. —on whatever legal matters it had.

A. Yes.

Q. And then you paid him, I suppose, some additional bills—you needn't tell what or how much—you paid him some additional fees for this extra service for as long as [fol. 136] it continued?

A. If it continued. I am not sure. I don't recall whether

it terminated with the case or if we had him for a little while longer.

Q. Would you be good enough to look that up and let me know at the next session?

A. Yes.

Q. Will you make a note of that, please?

Did you continue friendly with Mr. Egnal?

A. Oh, yes.

Q. And you think well of him?

A. Yes.

Q. You have high regard for him as a lawyer of integrity?

A. I have a high personal regard for him, yes.

[705]

Q. And by "personal" I take it you mean also professional regard for him, not merely as a man, but you have regard for his integrity as a lawyer?

A. Well, that is a tough question. I don't really know how to answer it.

Q. Well, you don't think he is dishonest?

A. Oh, no, I wouldn't say that.

Q. When I say "integrity" I mean you have regard for his integrity and honesty as a lawyer.

A. Integrity, yes.

[fol. 137] Q. And you have never had any grievance against him since that day to this?

A. No.

Q. When I say "you" I mean your company, you or Mr. Pantzer or your company.

A. I am not aware of any grievance.

Q. Have you seen him since the settlement and to this day?

A. Yes.

Q. And you are very friendly with him when you see him?

A. Just socially, you know, to say "Hello".

Q. Have you visited him at his home?

A. No.

Q. When you say "socially" how do you meet him?

[706-707]

A. Well, just casually.

Q. When the complaint was filed in the former action did you read it?

A. Yes.

Q. And you understood the grievances which were being asserted there against National Screen at that time?

A. Yes, yes, I did.

Q. And you know that the same grievances are asserted in your present action against National Screen, don't you?

A. Yes.

Q. You read the new complaint, which is—by "new" I [fol. 138] mean in the present action. You read that complaint?

A. Yes.

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Appendix

Pre-trial Examination of Mitchell Pantzer January 20, 1953

[746]

By Mr. Nizer:

Q. Did you in 1947 feel that you had grievances against

[747]

National Screen which were of a serious kind?

A. Yes.

Q. And you felt that way in 1946?

A. Yes.

Q. And in '45?

A. Yes.

Q. And yet you continued to threw away the origiaal bills which would reveal if there were any misouts on any materials that National Screen was supposed to send you?

A. Yes.

* * * * * * *

[fol. 139] [752]

By Mr. Nizer:

Q. Incidentally, as long as we are taking the liberty of shifting to you, is this your signature on this release signed in 1943 when the first action begun by you against National Screen was settled?

A. Yes, sir.

Mr. Mullinix: That is Exhibit D-61.

Mr. Nizer: Right.

By Mr. Nizer:

Q. And without going into the matter at length, would you confirm the testimony that Mr. Lawlor gave about that matter as you have heard it here today?

A. Not completely, no.

Q. You differ with him on some phases?

A. Very much so.

[753]

(Recess)

[fol. 140] By Mr. Nizer:

Q. You and Mr. Lawlor conferred and consulted about the settlement of the litigation that was begun in 1942, didn't you?

A. Yes.

Q. And you went over the terms of the settlement agreement very carefully with him, is that right?

A. Yes.

Q. You also went over it very carefully with you- lawyers, Mr. Egnal and Mr. Orlofsky, is that right?

A. Yes, sir.

Q. And did you differ with Mr. Lawlor's judgment that the settlement ought to be accepted and executed, or did you not?

A. No.

Q. So that you and he were in complete agreement with respect to the settlement that was executed and the release

which was given pursuant to it and the stipulation discontinuing the action with prejudice in the Federal Court?

A. Yes.

Q. And the negotiations with respect to what you were

[754]

receiving for that settlement went back and forth over a period of many weeks. Mr. Lawlor thought it was months. What is your recollection?

A. A matter of months.

[fol. 141] Q. And there were negotiations conducted by your counsel, Mr. Egnal, with National Screen and the distributing companies who were involved, is that right?

A. Yes.

Q. And each of these negotiations for improved terms from your viewpoint were reported to you by your counsel faithfully?

A. Yes.

Q. And each concession that was made to you, you accepted on his recommendation and on your wish?

A. No.

Q. And each rejection of a cause, you instructed him whenever you didn't want him to yield on something that was asked on the other side—you gave him instructions not to yield?

A. Gave whom instructions?

Q. Your lawyer, Mr. Egnal—isn't that right?

A. We discussed the matters, yes.

Q. Well, he followed your wishes as a client while he advised you as counsel—your counsel—your decision as

[755]

to whether a certain provision in the contract, which was a practical business matter, should be accepted, you guided him on, didn't you? You authorized him to do certain things, to make certain concessions or not to make them?

A. We were as much guided as doing the guiding.

Q. By your counsel?

A. That is right.

[fol. 142] Q. In other words, you shared your judgment with his as to what was the best thing to do?

A. No.
Q. Did you reject his advice?
A. We accepted it under the circumstances.

• • • • • • •

[755]

Q. Yes. And you accepted his advice after you and Mr. Lawlor would go over the matter carefully—and in your best judgment you thought that was the best thing to do if you couldn't get anything better? That is the way settlements are made, isn't it, Mr. Pantzer?
A. Yes.

[756]

Q. In other words, I am not trying to be technical about this; these negotiations that went on for months, like any other negotiations, whether it is a business deal or the settlement of any other kind of a controversy, was a matter of give and take both ways until you reached an agreement.

Mr. Poul: Don't answer that.
The Witness: No.

By Mr. Nizer:

Q. When you signed this release, did you know you were signing a general release?
A. Yes.
Q. Did you do so voluntarily?
[fol. 143] A. Yes.
Q. When you authorized—I don't know whether you authorized, but when you signed the release which ended the action with prejudice, did you do so voluntarily and authorize him to do it?
A. Yes.
Q. And thereafter you accepted in your business whatever the terms were of the sub-licensing agreement which was part of the settlement arrangement, did you not?
A. Yes.

[757]

Q. And you have lived under that sub-licensing agreement from the date of the settlement, when it went into operation in 1943 right to this date?

A. Yes.

Q. Receiving goods under it?

A. Yes.

Q. And receiving the goods under it at a price which was lower than you paid previously to the distributors?

A. No. Possibly—pardon me, as long as you modify "to the distributors," yes.

• • • • • • •

[fol. 144] [761]

Q. And the prices that you paid to National Screen for those standard accessories were lower than the prices which you paid when you acquired those same supplied from the distributors themselves when they made it, correct?

A. No.

• • • • • • •

Q. All right. What did you pay to Fox when you bought a 1 sheet from it?

A. Fifteen cents.

[762]

Q. And under the contract with National Screen, the settlement contract that was made by which National Screen had the supply of these materials and accessories, what did you pay National Screen for the same 1 sheet, a Fox 1 sheet?

A. Either 10 or 12 cents.

Q. So that there was a saving there of between 3 and 5 cents on each 1 sheet, right?

A. Yes.

Q. And 1 sheets are one of the big items that you deal with?

A. No.

Q. They are not?

A. No.

Q. Which are the popular items that you deal with?

A. 11 x 14, 22 x 28, 8 x 10 stills.

Q. All right. Let's take the popular items so as to be fairer about it, because if it were some isolated minor item it might not be so significant, so let's take the 22 by what?

A. 22 x 28.

Q. What did you pay Fox for that item?

[fol. 145] A. They were sold in pairs, two for 75 cents.

Q. And what did you pay National Screen?

A. As high as 60 cents each.

• • • • • • •

[764]

Q. Didn't you pay 35 cents to National Screen for each?

A. From New York, yes. If we were forced under circumstances, by failures of New York delivery, to buy them from local National Screen, we paid 60, and we have been paying 60 all through the year.

Q. Mr. Pantzer, let's not fence with one another. When you ordered your materials from National Screen—which of course means New York under the sublicense agreement

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Mr. Poul: I object to that. I think his answer was proper.

Mr. Nizer: Oh, his answer was very tricky, as I will soon demonstrate.

The Witness: That is what we paid. We paid in cash. We paid National Screen.

Mr. Poul: You just answer the questions.

By Mr. Nizer:

Q. I will give you a chance to explain it in full and I am not trying to fence with you and I would appreciate it if you wouldn't with me, and we will save a lot of time. You knew that when I talked about ordering from National Screen, I meant ordering under the sublicense agreement, ordering from National Screen's New York office in the first

[765]

instance, didn't you?

[fol. 146] A. I did not. You have been referring to local purchases and New York purchases in your talk today.

Q. When National Screen didn't have a supply, then, under the contract you had the privilege of going to the local office to pick some up, or to the poster renters. That was where National Screen didn't make them available. In the first instance, where did you place your order?

A. The National Screen home office in New York.

Q. And would you say that more than 90 per cent of your materials were shipped directly from the National Screen New York office pursuant to your orders—well over 90 per cent?

A. I wouldn't give any percentage but the greatest part of it.

Q. All right. Now, the greatest part of your 22 x 28 lobby displays were ordered directly from the home office in New York of National Screen pursuant to the contract provision, wasn't it?

A. Yes.

Q. And what did you have to pay when you got those shipped to you—how much did you pay for each of those? Would you like me to help you by showing you the schedule?

A. No, I am trying to answer properly the actual, true

[766]

cost, which includes shipping which we didn't have from the local exchanges.

Q. I will come to the local exchanges, and you stop anticipating every possibility and trying to correct things you think may be read into the question. I am asking you what was the price for a 22 x 28 lobby display when you ordered it from National Screen under the sublicense agreement?

[fol. 147] A. Thirty-five cents.

Q. All right. And what was it when you used to buy them from Fox, the same one?

A. Two for 75 cents.

Q. And what was it when you bought them from any of the other distributors? Were they all the same price, two for 75?

A. They varied.

Q. How did they vary? Give me the facts as you know them.

A. As well as I remember, the highest price was 40 cents each.

Q. So that at least with respect to certain companies, you had a 5-cent reduction from National Screen over the same product when you bought it from that company directly, right?

A. Yes.

* * * * * * *

[771]

Q. Now, so on down the line—I don't know whether it is

[772]

necessary to repeat it all. I am perfectly willing to. We have gone over these with Mr. Lawlor, who candidly didn't remember at all times the prices, so we showed it to him and we made the comparison and it is in the record. Isn't it a fact that, with maybe one or two exceptions where the price was either the same or so little different that it isn't of any particular significance, as the figures will show, that the prices under the sublicense agreement were less to you when you got them from National Screen than they were when you bought them directly from the distributors? Isn't that a correct statement?

[fol. 148] A. No, it isn't. I would like to contradict that.

Q. All right, since you started out——

A. If you are referring to just the list of prices, yes. If you refer to actual cost of material, no.

Q. Well, the price was what you paid when National Screen shipped it to you, wasn't it?

A. How was that?

Q. When they shipped you, you said you paid 8 cents per still, to National Screen.

A. That is right.

Q. Now, you got your overwhelming supply, a great majority of them, directly from National Screen through a New York order, right?

[773]

A. We got a necessary supply from New York. You say "overwhelming." I don't know what you mean by that.

Q. By "overwhelming," I mean of those necessary to you, they were supplied by National Screen in the very very large majority of cases. By "overwhelming," I mean the overwhelming majority of it came from National Screen whenever you ordered it, right?

A. Yes.

Q. Now, in those cases, they cost you 8 cents a still?

A. Yes.

Q. Are you trying to make the point that there was a shipping expense to you when the stills were sent to you, to Philadelphia?

A. Am I permitted to make my point?

Q. I am asking you a question. Did you pay a shipping expense when they were shipped to you from New York? [fol. 149] A. That was one of the costs, yes.

Q. What shipping expense did you pay for stills?

A. No particular shipping cost for any individual items. There was an overall cost.

Q. You mean that if the package contained stills and 1 sheets and 3 sheets and were shipped, that you were charged with the shipping expense?

A. Under certain circumstances, yes.

[774]

Q. I am talking of the circumstance of the regular order, the standing order.

A. The standing order, no.

Q. So, are we clear between us that when you put a standing order to National Screen – and you could make that as large as you wished – that when they shipped you that material, they bore the shipping expense and you got it at the exact price of the license agreement, right?

A. Right.

Q. And the only time that there was a shipping expense added to the cost was when you had underestimated the amount of product you would need and you had to put in later orders for a few extra sheets, or more than a few, and

then when they shipped it, they had a right to add the shipping expense they had gone to since you hadn't ordered the original amount to fulfill your needs; is that a fair statement of it?

A. No, unfair.

Q. You make that fair to me.

A. We never underestimated an order on any picture. You have stated a number of times today that we underordered. Our orders were perfectly in line with the proper [fol. 150] procedure of our business. In fact, it was more of an obligation to place those standing orders than it was before the contract with National Screen.

[775]

Q. All right, if you will permit me to clarify that by a few questions——

A. Can't I clarify it?

Q. Yes, but I want to ask you—I don't understand that when you say they were in line. Hold your thought and I will let you finish anything else you want to say. I don't mean to accuse you of anything when I say that you underestimated, so if you are sensitive about that for the purpose of this question, let me clarify that. All I am saying is that, in estimating the number of 1 sheets that you would need for a picture, you very frequently estimated, through the standing order, a lesser number than ultimately you needed; and later on, sometimes weeks later, sometimes only a few days later, sometimes months later, you would make an additional order and sometimes a third order, sometimes a fourth order and sometimes a fifth order—isn't that so?

A. No.

Q. Now, you tell me what the practice was on that.

A. We were forced to place what you call a standing order.

Q. By "forced," you mean the contract so provided?

A. Under the contracts, we were obligated.

Q. That is better. Yes. And——

A. The practice of our business was to purchase, as was the practice of all poster companies through the years,

[776]

piece by piece, item by item, as was needed from each film [fol. 151] exchange, so that the life, the activity of a picture, no matter, would always properly shape itself up or the material on hand would shape itself up to the playoff of a picture. As more material was needed for rental purposes, more could be purchased in individual items. If a picture was of a poor nature, lesser material was bought.

Q. Now, were the distributors ever out of supply?

A. Strangely, I would say on rare occasions. Only during the early active life of a picture. On the other hand, film companies would have material on their shelves years following the completion of the playoff of a picture, as compared to a complete failure of National Screen's part to supply material at the very beginning of the playoff of an important picture, for any picture.

Q. So that you say, if I understand the substance of your present statement, your grievance, then is—let me see if I can state your own grievance as you have explained it. Your grievance is that National Screen should have made more materials of each kind to have on stock beyond that which it made so that if you came up a few weeks or a few months later and said, "I want two more 1 sheets," they would be sure to have it for you. That is your grievance?

A. That is not my grievance.

[777]

Q. That is not your grievance? You don't claim that National Screen made inadequate gross amounts of these materials which ran out?

A. I have never placed myself in the position to dictate as to what National Screen should or shouldn't manufacture. [fol. 152] Q. So that your grievance is not that National Screen made inadequate supplies of these materials?

A. That is not my grievance.

Q. Now, where you reordered only in those instances of reorder would there be a shipping expense, isn't that so?

A. That is right.

Q. Now, how large is that shipping expense? Will you give me an idea? Suppose you ordered a package of, let's

say—let's take one of these letters that we just had before us, some twelve 3 sheets and some stills and one 1 sheet; how much would the shipping expense be on that?

A. Our shipping orders weren't that small. Our average shipping cost could run anywhere from 75 cents to $1.50 or more a package shipped.

Q. And——

A. Let me further qualify that.

Q. Yes.

A. There have been times when National Screen failed to include certain items in a shipment and would follow

[778]

through with those individual items at the rate of cost of 65 or 75 cents a 1 sheet to include the shipping cost, or 50 or 60 cents a single still. We have had many such experiences, where, because of the manner of making up an order and following through with shipments, four and five weeks after the order had been placed with National Screen, that we would get a continuity of shipments, a string of shipments bearing the shipping costs to us.

[fol. 153] [781]

Q. And throughout all these years, you have lived with this sub-license agreement and this settlement, trying to live up to it on your part as your end of the contract, and you claim, however, that National Screen didn't in all instances live up to its end of the contract; isn't that the nature of your grievance here generally?

A. Very much so.

Q. And your real insistence has been that National Screen should live up to this sub-license agreement and give you the fruits of the settlement which were made through this sub-license agreement? Your grievance is that you want National Screen to live up to its contract?

A. No.

Q. You don't want it to live up to its contract?

A. That wasn't my grievance, my attitude.

Q. Answer my question first. You have, up to this day, in any event, sought to live up to that sub-license agreement so far as you are concerned, I take it.

[782]

A. As an obligation.

Q. Yes, as a legal obligation which you consider binding on you, right?

A. Yes.

Q. And you have expected National Screen to do the same on its part of that contract?

A. Yes.

Q. And these letters of complaints of late delivery, and [fol. 154] what not, are grievances that National Screen hasn't lived up to its end of the contract, right? Isn't that a fair statement of the nature of this agreement?

A. Yes, they are a segment of the nature of the grievance.

Q. Now, you also, do you, differ with Mr. Lawlor, or did you agree with Mr. Lawlor, that, to this very day, you have continued to receive whatever the benefits and the obligations are of the settlement agreement?

A. I will not acknowledge having received benefits. We have lived under the obligation of the contract to this day.

* * * * * * *

[783]

Q. Now, limiting yourself, so that we can deal with one subject at a time, to the 1943 settlement, the release and the settlement was filed in court discontinuing with prejudice, did you consider that that settlement and that release ended that litigation completely and washed it out?

A. Yes.

Q. Did you consider that it ended for all time any grievances which you asserted in your complaint in that action?

A. Ended the grievance?

Mr. Poul: I object to that. I think you are asking him questions of law now.

[fol. 155] Mr. Nizer: I don't think so, and may he answer and you can raise the question.

Mr. Poul: Yes, he can answer.

By Mr. Nizer:

Q. I repeat the question. You did not consider that the grievances which were set forth in your complaint, which

were settled and release given, were washed out and ended forever so far as you were concerned?

[784]

A. No.

* * * * * * *

[785]

Q. Do you consider that the release and the stipulation ending that action with prejudice wiped out the grievances that you had asserted in that action?

A. No, sir.

Q. You contend that those grievances survived?

A. Yes.

[fol. 156] Q. When you signed the release, the general release, did you read it?

A. At that time, as well as I can remember, yes.

Q. Did you understand it?

A. Yes.

Q. Did your lawyer tell you what you were signing?

A. I wouldn't remember that.

Q. Well, whether you remember it or not, from your conversations with him and from your having read it, what did you think that release did?

A. It put an end to our fight to have an untrammeled, a competitive field in our business, that we were in a position to accept such conditions as we felt forced to accept to stay in business and live under such obligations whether we

[786]

liked it or not.

Q. What did you think the release did? Did it put an end to all of that or didn't it?

A. It did not put an end to our grievances. I felt that it put an end to our legal fight. It put an end to any opportunity we might have to fight for a free competitive field in our business.

[fol. 157] Q. And when you use the word "forced," did you mean it the way Mr. Lawlor explained it, that other plaintiffs forced you to do this?

A. No.

Q. You didn't, in other words, simply abide by the advice of the other plaintiffs, the majority?

A. No, and there was not any advice by any majority.

Q. Did you abide, did your counsel, Mr. Egnal, advise you to make this settlement?

A. I don't know whether this is ethical or not to refer to conversations of our counsel.

Mr. Poul: You just answer his questions. I will make the objections.

By Mr. Nizer:

Q. Did your counsel advise you to make the settlement, was my sole question.

A. He urged us to end it—end the negotiations, come

[787]

what may.

Q. End the negotiations or the conflict, you mean?

A. End the negotiations and the conflict.

Q. You mean to settle?

A. End it.

Q. End it by this settlement?

A. "Through fighting. This is it or else."

[fol. 158] Q. Or else he would seek an injunction and damages?

A. Seek nothing. This is it, and that is all.

Q. Did you ever read your complaint?

A. Yes.

Q. You knew that the complaint sought an injunction against these alleged grievances of yours?

A. Yes.

Q. And if you were right, your lawyer told you you would get injunctive relief?

A. As a layman, I knew little about my rights under the anti-trust laws.

Q. I am asking you whether your lawyer told you.

Mr. Poul: That was a perfectly proper answer, I insist.

Mr. Nizer: And I am just following it with another, so I am not quarreling with you.

By Mr. Nizer:

[788]

Q. Did your lawyer tell you that if you were right in the grievances you set forth in your complaint, you would obtain an injunction against the continuance of those alleged grievances?

A. I can't recollect any such statement.

Q. You know that injunctive relief was asked for in the complaint?

[fol. 159] A. That was printed, yes.

Q. And you also know that you were seeking, in addition to that, full damages for any damage that you could prove or that you had suffered as the result of these alleged grievances?

A. Yes.

Q. And Mr. Egnal never withdrew from this litigation, did he?

A. I expressed myself clearly on that point. To the final signing of the agreement, he was in on that.

Q. Please answer my question. Did Mr. Egnal ever withdraw from this litigation?

A. No.

Q. Did he ever say if you wouldn't take the settlement he would withdraw from the litigation?

A. Yes.

Q. So that, by "forced," you mean that your lawyer,

[78.]

Mr. Egnal, was putting pressure upon you by saying that if you didn't take this settlement, he would withdraw from the litigation?

A. No.

Q. Did he say he would withdraw from the litigation if you didn't settle?

A. Yes.

[fol. 160] Q. In other words, he recommended this settlement to you so strongly that he said, "If you don't take it,

I won't continue with the suit." Is that the substance of it?

A. No, his appreciation wasn't spectacular about it.

Q. I don't understand that answer. Did your lawyer tell you that if you didn't go through with this settlement which had been negotiated over months, that he would not proceed with the lawsuit?

A. He was withdrawing if that wasn't accepted, yes.

Q. He was withdrawing as counsel?

A. From the case, yes.

Q. And is that what you meant by the force that you were under?

A. No.

Q. That didn't constitute pressure upon you?

A. No.

[790]

Q. Did you consider getting another lawyer?

A. No.

Q. Did you agree with him after full consideration of the facts that you ought to settle the case?

A. No.

Q. You knew you were settling the case when you signed the release?

[fol. 161] A. We knew we had to, not that we ought to.

Q. By "had to," you mean because he would withdraw if you didn't?

A. No.

Q. Well, did the other plaintiffs in the case put pressure upon you to settle?

A. No.

Q. Did National Screen say if you didn't settle anything would happen to you?

A. No.

Q. Did National Screen's lawyers tell you that?

A. No.

Q. Well, then, when you said you had to, would you tell me just what you mean?

A. Yes.

Q. Go ahead.

A. We were clearly at a point in our business, all of our

[791]

business—independent poster men—of being in or out of the business. By virtue of the withdrawal of Metro source of material and the threat of other film companies giving National Screen their exclusive distribution rights, we recognized the finish to our poster business without a complete source of material to our customers.

[fol. 162] It was a matter of sheer necessity to all of us in the poster business to grasp at not the deal that was offered to us but the only possible source of continued or continued source of material to stay alive in the business; that if we discarded or passed by the offering such as it was, that was given to us, that we positively had to close our doors.

Q. Is that the full explanation of what you mean by being forced to do it?

A. By the circumstances, caused by National Screen's absorbing Metro and the statements and the history such as it has proven itself, that the other companies would follow suit.

Q. I say, is that the full explanation of what you mean by "forced?"

A. At the moment, as I recollect my feelings, that was the basis of being forced to go in to that deal.

[792]

Q. Now, you started this action because of the very reason—the first action, the one that was started in 1942—you started that action for the very reasons that you have just stated, didn't you?

A. Yes.

Q. So, at the time you started this action, you were going to seek injunctive remedy that would keep you in business [fol. 163] by stopping what you claimed was wrong—if it was wrong, you would get that remedy, and also damages on top of that? That is how you started this proceeding, the first one?

A. Yes.

Q. And all that you told us about the economic situation, the circumstances, as you called them, existed at the time you started the lawsuit, didn't it?

adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest: Ida O. Creskoff, Clerk.

March 30, 1954.

[Stamp:] Received & Filed, March 30, 1954. Ida O. Creskoff, Clerk.

A. No.

Q. What change took place after the lawsuit was begun by you?

A. I don't know just what you mean by "begun," whether you mean the interest we first displayed in action or whether you are referring to the filing of the case in court.

Q. No. I am talking about the fact that you started a suit because of the very circumstances you have just de-

[793]

scribed when I gave you a full opportunity to express yourself. That was the reason you started that first suit, that you felt, as the result of all the things that you described, that it was a matter of being in business or out of business, so you started the suit.

A. Yes.

[fol. 161] Q. And you were advised by your counsel that if you were right, you would obtain injunctive relief, so that none of these things that you complained about would be continued. That is what your printed complaint showed, isn't it?

A. As I remember it——

Q. That is my question first.

A. I am trying to recollect what my attorney told me twelve years ago.

Q. All right.

A. As I recollect, I knew very little about the law——

Q. Now, that is no answer to my question.

A. And——

Q. Mr. Pantzer, I will have to interrupt you.

A. All right, ask me the question again and I will try to be a little more clear.

Q. I will ask the question again. The very circum-

[794]

stances you have just described as being responsible for your settling this action were the same circumstances which caused you to bring the action in the first place in 1942, right?

A. No.

[fol. 97] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,210

CHARLES LAWLOR and MITCHELL PANTZER, Co-partners Trading as INDEPENDENT POSTER EXCHANGE, Appellants,

v.

NATIONAL SCREEN SERVICE CORP.; COLUMBIA PICTURES CORP.; EAGLE LION FILM, INC.; FILM CLASSICS, INC.; LOEW'S INCORPORATED; MONOGRAM PICTURES CORP.; PARAMOUNT PICTURES, INC.; REPUBLIC PICTURES CORP.; RKO RADIO PICTURES, INC.; 20TH CENTURY FOX FILM CORP.; UNITED ARTISTS CORP.; WARNER BROTHERS PICTURES, INC.

SUR PETITION FOR REHEARING

Present: Goodrich, McLaughlin and Hastie, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court.

Goodrich, Circuit Judge.

Dated: 4/23/54

[Stamp:] Received & Filed, April 23, 1954. Ida O. Creskoff, Clerk.

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 165] Q. Was there any difference between the circumstances you have just described that faced you in 1943 and the circumstances which caused you to bring the action?

A. Yes.

Q. What were the differences?

A. The appearance of the Metro exclusive deal with National Screen, not only in itself a destructive force to our own operation——

Q. Now, wait, don't characterize it and make a speech. I am asking for differences, Mr. Pantzer. You say that Metro's agreement with National Screen succeeded your institution of this suit of 1942? Or didn't it? Let's stick to a few facts.

A. Let me try to remember relative dates. The Metro deal was being consummated over a period of time and we started our action when that deal was being worked on.

Q. All right. Then, you felt that that was another one of the things that you were complaining about and you put it right into your complaint, didn't you?

[795]

A. That was the thing that we had to complain about at that time.

Q. So, you made the complaint, you filed the suit seeking injunctive relief and legal damage relief for the very grounds that you told me later you felt obliged to settle?

[fol. 166] A. Right.

* * * * * * *

[797]

Q. And you hoped that if you were right, you would put an end to this by enjoining, getting an injunction against the companies from continuing these things?

A. Yes.

Q. And you also hoped, in addition to that, that if you were right, you would get damages so that anything you lost in the meantime would be repaid to you by way of damages in addition to an injunction; right?

A. Yes.

Q. And all of this, you felt was your remedy at the time

that you filed your complaint, as your complaint requests that remedy, right? There is nothing difficult about that.

A. As far as I know, yes.

* * * * * * *

[799]

Q. Now, there were several companies, other plaintiffs, that didn't go into the settlement; isn't that so? Do you know that?

A. I vaguely remember one or two that—one, I believe, that didn't.

Q. And you had, is it correct to say, according to your understanding of it at that time, at the time of the settle-

[800]

[fol. 167] ment—you had one of the following choices: to continue the suit, get injunctive relief and damages, or settle the case?

A. I had no choice. Just to settle or be out of business.

Q. Well, if you were out of business—let's assume that. Now, let's pursue that. Follow me now. Assume that everything that you feared came to pass, that you were out of business, had to close your doors and you still had the suit pending; you could continue the suit, couldn't you?

A. The suit would not have been pending. I explained that the lawyer was ending it as of a particular day.

Q. Well, then, you could have gotten another lawyer, couldn't you?

A. If we were in a financial position at that time—which we were quickly—well, let me put it this way. Had we been in financial position to get further legal help, we would have, possibly. At that time our business limited us to a point that we could only go so far as our financial condition allowed.

Q. Well, did you have a contingent fee arrangement with Mr. Egnal?

A. We paid him for services as he did them, whatever

[fol. 168] [801]

you would call that.

Q. Have you a contingent fee arrangement with your present counsel?

A. We have an arrangement that calls for a contingent fee.

Q. And your present counsel is counsel of high standing, is it not?

A. That is right.

Q. Did you at that time attempt to interest other counsel, whether your present counsel or any other counsel, on a contingent fee basis?

A. We did not.

Q. So, you never made that effort?

A. We were guided by our attorney——

Q. But, now, guided is different, I think—I am giving you a fair chance now to stick to your guns. You say you were guided by your attorney, but, as I understood it, you told me that what he did, in effect, left you no choice. That is not guidance. So, let me put it directly to you and you answer my question: Do you say that Egnal forced you to enter into this settlement by virtue of his threats to drop the case if you didn't agree with him?

A. He did not.

[fol. 169] [802]

Q. Did he tell you that you couldn't win the case?

A. All indications coming from him suggested we—from him as an attorney, and my observations as a layman—that we had no case if we didn't accept that deal.

Q. In other words, that if you continued the lawsuit, you would lose it; in other words, it is best to take this contract?

A. No. When I said "guidance," before, I felt that if he was interested to proceed as an attorney, I respected our possibilities in further fighting the case, if it were possible to fight it. If he showed a disinterest, I as a layman certainly didn't have any further fighting interest.

Q. In other words, I come back to my prior question, if you will be good enough to listen to it and answer it directly.

Did he tell you that if he had to fight the case to a finish, he didn't think you could win, that you had a reasonable chance to win?

A. As well as I remember, no such remark was made.

Q. But it was his attitude that he was going to withdraw from the case which forced you to settle the case?

A. It did not.

[fol. 170] Q. Well, if it wasn't his attitude, what is the

[803]

significance? Why do you stress the fact that he told you you either take this or I withdraw? Is that what he told you?

A. I can't state his exact expression. His intention was to withdraw from the case, that he had handled it to the extent that he could handle it with you, in negotiations with you.

* * * * * * *

[804]

Q. You have talked of his intention but you don't remember his words so I would still like to pursue that. Did he express his intention to withdraw from the suit, in so many words, to you?

A. Yes.

Q. Did he tell that to Mr. Lawlor in your presence?

A. Yes.

Q. And did he say, "If you don't take this settlement, I am withdrawing as counsel?"

A. Yes.

Q. Did he tell that to the other plaintiffs in the suit?

A. As well as I remember, yes.

Q. Was that at any meeting with all the other plaintiffs?

A. Not all of them. There were others there.

Q. Where was this said, and when?

A. In his office.

Q. When?

A. The day we signed.

[fol. 171] Q. Were there other plaintiffs who thought, even before he said this, that you should sign?

A. Their thinking, as well as I could recall it, was one of sheer necessity to sign.

[805]

Mr. Nizer: I move to strike that out. I am not talking about their thinking, as you recall it.

By Mr. Nizer:

Q. I asked you whether there were other plaintiffs who wanted to go through with the settlement before Egnal threatened to withdraw.

A. As far as I can recollect, no one in particular was at that moment ready to sign.

Q. Would you be willing, if the correspondence that you refer to exists in Mr. Egnal's office rather than Mr. Poul's office, to authorize us to look at that correspondence with respect to this alleged withdrawl [sic] on his part?

Mr. Poul: I advise you not to.

The Witness: Under counsellor's advice, I would say no.

By Mr. Nizer:

Q. Now, the settlement did away with any threat to you to have to close your doors, didn't it?

A. No.

Q. You have kept your doors open from that date to this.

A. The threat was always there constantly.

[fol. 172] [806]

Mr. Nizer: I move to strike out the answer as not responsive.

* * * * * * *

[807]

By Mr. Nizer:

Q. I want it as a matter of fact and admission. You have been in business from the date of this settlement to this date, haven't you?

A. Yes, we have.

Q. And your business has grown during that period, hasn't it?

A. Yes, it has.

Q. And your volume has increased substantially during that period?

A. Not substantially.

Q. It has increased from roughly one thousand or fifteen hundred dollars of purchases from National Screen

[808]

to ten times that, hasn't it?

A. National Screen has taken on about ten companies in that time.

Q. Yes.

A. Therefore, our purchases have been diverted from Columbia and Fox and Universal and all companies to National Screen.

Q. Then, let's take a look at your gross sales. Have they increased during this period since the settlement?

A. Yes, they have.

[809]

[fol. 173] Q. How substantially? Give me the range.

A. Not substantially.

Q. Give me the range.

A. Very limited range, is about the best way I can tell you.

Q. No, give me the range in figures. Do you want to look at the reports, the tax records? Shall we read it off to you?

Mr. Poul: Why not put it on the record?

The Witness: We started in business at zero.

By Mr. Nizer:

Q. I am talking of the date of settlement, not when you started. I will read it into the record and if you want to make any comment about it, I don't mind. Your 1942 return, the year before the settlement, is $16,823 gross receipts. In 1949 it is $35,219.67. That is more than double, isn't it?

A. Yes.

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JUN 23 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

No. 163

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,
Petitioners,

vs.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., 20TH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., WARNER BROS. PICTURES DISTRIBUTING CORP., PARAMOUNT FILM DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES, INC.,
Respondents.

PETITION OF CHARLES LAWLOR AND MITCHELL PANTZER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRANCIS ANDERSON,
2100 Girard Trust Building,
Philadelphia 2, Pa.,
Attorney for Petitioners.

GRAY, ANDERSON, SCHAFFER & ROME,
2100 Girard Trust Building,
Philadelphia 2, Pa.,
Of Counsel.

Martin & Lyle, 1103 Bankers Securities Bldg., Phila. 7, Pa.

Q. Would you consider that a substantial increase?

A. A terrible increase.

Q. I say, would you consider it a substantial increase?

A. No, I think it is a very poor increase. In two years we had done much more, comparatively, than we did in the following eight or nine years, by comparison of gross. The second year in business was only the beginning. We hadn't scratched the surface of the territory, nor had we scratched it in '43, '44 or '45.

[810]

Q. And did your profits also increase from 1943 to 1949?

A. Comparatively——

[fol. 174] Q. I am not asking for comparative figures. Now, listen to my question, Mr. Pantzer. Your counsel sometimes objects to my being argumentative, and I think that should be addressed to you. Don't argue with me. Just answer my question.

A. I am trying to learn the true nature of the question.

Q. The simple question is, did your profits increase from 1943 to 1949?

A. Yes.

[fol. 175] In United States District Court

Excerpt from Transcript of Proceedings Before the Honorable William H. Kirkpatrick on October 20, 1953

"Mr. Nizer: May I ask Mr. Anderson to concede the authenticity of the renewal agreement in 1946, which is annexed to our answer, signed by your client?

"Mr. Anderson: Sure."

[fol. 88] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,210

CHARLES LAWLOR and MITCHELL PANTZER, Co-partners Trading as INDEPENDANT POSTER EXCHANGE,

v.

NATIONAL SCREEN SERVICE CORPORATION, et al.

STIPULATION OF COUNSEL

It is stipulated and agreed, by and among the undersigned, counsel for all parties to this appeal, subject to the approval of this court, that the appellants will file and serve their brief on or before December 18, 1953, and that the appellees will file and serve their briefs on or before January 18, 1954.

Gray, Anderson, Schaffer & Rome. By (S.) Francis Anderson, 2100 Girard Trust Building, Philadelphia 2, Pennsylvania, Attorneys for appellants. (S.) Louis J. Goffman, 12th Floor Packard Building, Philadelphia 2, Pennsylvania, Attorney for Warner Bros. Pictures Distributing Corporation, appellee. (S.) Earl G. Harrison, 1719 Packard Building, Philadelphia 2, Pennsylvania, Attorney for National Screen Service Corporation, Columbia Pictures Corporation, Loew's Incorporated, Paramount Film Distributing Corporation, RKO Radio Pictures, Inc., T C F Film Corporation (formerly Twentieth Century-Fox Film Corporation), United Artists Corporation and Universal Film Exchanges, Inc., appellees.

December 10, 1953. Approved: Kalodner, J.

[Stamp:] Received & Filed Dec. 10, 1953. Ida O. Creskoff, Clerk.

[fol. 89] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,210

CHARLES LAWLOR and MITCHELL PANTZER, Co-partners Trading as INDEPENDENT POSTER EXCHANGE, Appellants,

v.

NATIONAL SCREEN SERVICE CORP.; COLUMBIA PICTURES CORP.; EAGLE LION FILM, INC.; FILM CLASSICS, INC.; LOWE'S INCORPORATED; MONOGRAM PICTURES CORP.; PARAMOUNT PICTURES, INC.; REPUBLIC PICTURES CORP.; RKO RADIO PICTURES, INC.; 20TH CENTURY FOX FILM CORP.; UNITED ARTISTS CORP.; WARNER BROTHERS PICTURES, INC.

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued February 1, 1954

Before Goodrich, McLaughlin and Hastie, Circuit Judges

OPINION OF THE COURT—Filed March 30, 1954

By GOODRICH, *Circuit Judge*

This suit arises upon a matter collateral to the distribution and exhibition of motion picture films. The plaintiffs ("Poster Co.") are engaged in the business of leasing advertising posters ("standard accessories") to exhibitors in the Philadelphia area. The defendant ("Screen Corporation") distributes standard accessories, specialty accessories and "trailers" in the Philadelphia area and on a nation-wide basis. Screen Corporation has been granted [fol. 90] exclusive licenses to distribute this material by all of the major moving picture producers.

In 1942 Poster Co. instituted a treble-damage suit against Screen Corporation and three of the eight producers who are defendants in the present action. Poster Co. also sought an injunction. By stipulation of the parties this suit was dismissed with prejudice on April 21, 1943. By a contract dated the same day, Screen Corporation agreed to furnish

Poster Co. with standard accessories and granted Poster Co. a nonexclusive license to compete with it in Philadelphia. This contract was renewed in 1946 for a five-year period.

In 1949 Poster Co. commenced the present action against Screen Corporation and the eight producers, and again sought an injunction and treble damages from 1943 to 1949. In 1951 Judge McGranery granted Poster Co.'s motion for summary judgment as to an injunction against Screen Corporation only, but a final decree was never framed. In 1953 Judge Kirkpatrick granted the defendants' motion to dismiss on the grounds that the 1942 judgment was res judicata of this claim.

The phase of the doctrine of res judicata here concerned is the effect of the 1942 dismissal with prejudice as a bar to the present suit. No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter.[1] Nor is there any question [fol. 91] of merger of plaintiffs' claims by the 1942 judgment, because, by the dismissal with prejudice, the defendant is the record winner in the original suit.

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[1] "(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . .

"(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

Restatement, Judgments § 68 (1942). For provisions regarding questions of law, see § 70. The Supreme Court has recently held that when, as here, there has been no hearing, no stipulations of fact, no briefs filed, no oral argument, and no showing that the issues were determined by the court the judgment has no effect as collateral estoppel. United States v. International Building Co., 345 U. S. 502 (1953).

What did the 1942 judgment do to the possibility of recovery in this suit? It should be noted at the outset that our problem here is not affected by the fact that the dismissal of the 1942 action was by stipulation instead of the result of a trial on the facts and the law. A consent judgment or, like the one present, one which is a "dismissal with prejudice" has the same effect as a bar as if the case had gone to trial and the judgment rendered thereafter. 2 Freeman on Judgments 1395-96 (5th ed. 1925); United States v. Parker, 120 U. S. 89 (1887); Urbino v. Puerto Rico Ry. Light & Power Co., 164 F. 2d 12 (C. A. 1, 1947.

The decision of the case is going to depend upon whether the plaintiffs in the present suit are suing upon the "same cause of action" as that upon which they sued in 1942 and lost. If they are, then they are barred from suing again. If they are not, they may maintain this action. This Court struggled with the "cause of action" question in Williamson v. Columbia Gas & Electric Corp., 186 F. 2d 464 (1950), but the problem in that case was so different from the one here that we do not see that it materially aids our solution. It is recognized that the term may change its meaning when used in different situations. Restatement, judgments, Introductory Note p. 129 (1942). There is already a good-sized body of legal literature on the question of what constitutes a cause of action, a subject upon which learned doctors disagree. Some of the literature on the problems is reviewed "Res Judicata Reexamined" by Edward W. Cleary in 57 Yale Law Journal 339, 340 n. 7 (1948). Perhaps some words of that author (though not in context) show the difficulties here involved. He is talking about situations where a plaintiff splits his cause of action and he says at page 346: "In deciding such cases, the concept of a cause of action possesses real utility if applied with realization of what actually is at issue and with due regard [fol. 92] for the other factors herein discussed." This sounds easy if one says it fast. The core of our problem is to find out whether what is at issue is the same thing as what was at issue.

Some situations are easy to solve and those are the ones upon which it is easy to find authority. Take the case of a single isolated tort, for instance. A attacks B and beats

him. Six months later he does it again. Whatever judgment might be rendered, for either party, in a suit for the first battery would not be a bar to a suit for the second battery. Restatement, Judgments § 61, comment *c* (1942). The only possibility of its having any effect in the suit for the second battery would be the binding effects of collateral estoppel, if there were any. We have somewhat the same thing where the tort claimed is a repeated trespass to land by entering and cutting timber. Here, too, the invasion of the plaintiff's interest is a separate one each time and recovery or defeat in a first suit will not preclude a second unless some element of collateral estoppel is involved.[2] When the plaintiff's complaint is for a nuisance maintained by the defendant or for a continuing invasion of plaintiff's land, by a structure on the defendant's land, then the question becomes complicated with factors such as the permanence of the structure, whether the invasion can be abated by means of an injunction, and so on. Here the problems have become so complex that there is little to be gained by referring to analogies which, themselves, show only a state of confusion.[3]

All this leads up to the instant problem but does not solve it. We have a further difficulty. Conspiracy alone is not a tort although it may be a crime, as pointed out in the Columbia Gas case cited above. Acts done in pursuance of [fol. 93] the conspiracy become actionable when they hurt a plaintiff. On the other hand if the plaintiff complains about a conspiracy, asks for damages for acts done pursuant thereto and to have the conspiracy stopped by injunction, when he loses that lawsuit by judgment is he barred from thereafter claiming damages for other acts, or further acts, which he says are done in furtherance of the original conspiracy? We think he is, although neither counsel nor we have found an instance where on this very set of facts a court has so decided.

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[2] Avery v. White, 83 Conn. 311, 76 Atl. 360 (1910), discussed in 2 Freeman on Judgments 1305 (5th ed. 1925).

[3] See 2 Freeman, *op. cit. supra* note 2, at 1295 and following. For analysis of one state's difficulty along this line, see Goodrich, "Permanent Structures and Continuing Injuries—The Iowa Rule," 4 Iowa L. Bull. 67 (1918).

The following question then becomes the next one to answer. Did the plaintiffs in their 1942 suit base their claim upon essentially the same course of wrongful conduct of which they complained in 1949? Judge Kirkpatrick thought so and so decided. We agree. It is true that there are some additional allegations, some new acts which the plaintiffs say the defendants have done since the earlier suit. But we think in substance the complaint is the same and that what plaintiffs object to is an alleged combination of the defendants to do illegal things harmful to the plaintiffs' business and acts done pursuant to that combination. Since plaintiffs by their consent judgment in 1942 had an adjudication against their claim at that time we do not think they improve their position by reiterating essentially the same complaint in 1949.

Additional defendants were joined in the 1949 suit. Judge Kirkpatrick met this point as follows:

> "The defense of res judicata is available to those defendants in the present suit who were not joined in the 1942 action. In Bruszewski v. United States, 181 F. 2d 419, the Court pointed out that where 'res judicata is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts have * * * enlarged the area of res judicata beyond any definable categories of privity between the defendants.' The only question is whether the relationship between all the defendants is close enough to [fol. 94] make it a fair and proper application of the policy of the law that there should be an end to litigation. I have no doubt that the relationship of the defendants in this case, taking into consideration the allegations of the 1942 complaint, is close enough to bring them all within the scope of the doctrine of res judicata."

We cannot improve upon this statement.

The plaintiffs claim that the 1942 suit was settled because of "duress." Of course it is not suggested that there was any physical compulsion. What is meant is that their economic position was such that this was the best settlement they could get. It is well settled that merely because one enters into an agreement which he would not enter if he did

not need the money there is not such duress as will void the contract. See Rector v. Sunerest Lumber Co., 52 F. 2d 946 (C. A. 4, 1931); and Restatement, Contracts, § 494 (1932). Lest this generalization be thought too sweeping it should be stated as a matter of caution that it does not apply to settlements of suits by railroad employees against employers for personal injuries, seamen's cases and the like.

The judgment will be affirmed.

A true Copy:

Teste:

_____, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 95] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,210

CHARLES LAWLOR and MITCHELL PANIZER, Co-partners Trading as INDEPENDENT POSTER EXCHANGE, Appellants,

v.

NATIONAL SCREEN SERVICE CORP.; COLUMBIA PICTURES CORP.; EAGLE LION FILM, INC.; FILM CLASSICS, INC.; LOEW'S INCORPORATED; MONOGRAM PICTURES CORP.; PARAMOUNT PICTURES, INC.; REPUBLIC PICTURES CORP.; RKO RADIO PICTURES, INC.; 20TH CENTURY FOX FILM CORP.; UNITED ARTISTS CORP.; WARNER BROTHERS PICTURES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: Goodrich, McLaughlin and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and

[fol. 186] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

Charles Lawlor and Mitchell Pantzer, Co-Partners Trading as Independent Poster Exchange, Petitioners,

vs.

National Screen Service Corporation et al.

ORDER ALLOWING CERTIORARI.—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8734)

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IN THE

SUPREME COURT OF THE UNITED STATES.

No.

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,

Petitioners,

vs.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., 20TH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., WARNER BROS. PICTURES DISTRIBUTING CORP., PARAMOUNT FILM DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES, INC.,

Respondents.

PETITION OF CHARLES LAWLOR AND MITCHELL PANTZER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the District Court (R 76a-84a) is unreported. The opinion of the Court of Appeals (R 89a) is reported at 211 F. 2d 934.

JURISDICTION.

The judgment of the Court of Appeals was entered March 30, 1954. A timely petition for a rehearing was filed April 14, 1954 (R 96a) and denied April 23, 1954 (R 101a). The jurisdiction of this Court is invoked under 28 USC §1254 (1).

QUESTIONS PRESENTED.

1. Will a consent judgment of dismissal of an anti-trust action, with prejudice, but without any actual adjudication by the court, prevent the plaintiff from bringing a second action, against the same parties, and based on continuance of the same conspiracy, but claiming relief only for restraints imposed and losses sustained subsequent to the termination of the first action?

2. If so, may plaintiffs maintain their second action against persons who were not parties to the first action but who joined the conspiracy after the termination of that action?

STATUTES INVOLVED.

Sherman Act (Act of July 2, 1890, 26 Stat. 209 USC, §§1, 2); Clayton Act (Act of October 15, 1914, 38 Stat. 731, 737, 15 USC §§15, 26).

STATEMENT.

Since December, 1940, petitioners have been proprietors of a business known as the motion picture poster renting business (R 11a).[1] The posters are displayed on the theatre premises for the purpose of advertising the current and coming attractions. They are generally called standard posters, or standard accessories (R 10a). Because of the fact that feature motion pictures are shown in a number of theatres in every locality the posters can be used over and over again, and therefore they are rented to exhibitors instead of being sold (R 44a-45a). Petitioners and others who are in the business of servicing exhibitors with supplies of these posters are called poster renters. Petitioners' business is limited to the area included in the Philadelphia motion picture district (R 44a, 46a-47a).

Since January, 1940, respondent National Screen Service Corporation (hereafter called National) also has operated a standard poster renting business, but on a national scale (R 11a, 56a). It competes with petitioners in the Philadelphia district (R 13a, 29a, 47a).

The other respondents are the eight major motion picture producing companies of America (R 28a-49a). They control the production and initial distribution of the standard posters relating to their pictures (R 10a-11a, 44a, 48a).

Prior to 1940,[2] all standard poster renters could obtain supplies of posters directly from all the eight major film companies without any difficulty (R 44a-45a, 59a); but in

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[1] Petitioner Charles Lawlor has been in this business since 1930 (R 44a).

[2] In that period National did not handle standard posters, but it was a well known national distributor of a more elaborate, but at that time less important, kind of poster known as a specialty, or "screen process" poster, and also short advertising films known as trailers (R 46a-46a, 57a).

January, 1940, two film companies, Paramount Film Distributing Corp. and RKO Radio Pictures, Inc., entered into written license agreements with National whereby National was given the exclusive right to obtain supplies of their standard posters for distribution in the United States,[3] and National thereupon entered the standard poster-renting business (R 52a, 46a). Since a poster renter must offer a service of posters of all major film companies, this grant of exclusive privileges to National appeared to sound the death knell for all the original poster renters, and, indeed, a large number of them promptly sold out to National (R 46a, 72a-74a). Petitioners, however, and some others, found a way —"with difficulty and at a high price"—to buy a stop-gap supply of Paramount and RKO posters from independent Canadian sources and thus managed to remain in business (R 47a). The other six film companies continued, for the time being, to sell their posters to all renters, including National, on equal terms (R 46a, 47a).

On February 6, 1942, a third film company, Loew's Incorporated, likewise granted National exclusive access to its standard posters (R 17a-18a); whereupon petitioners, and other still-surviving independents, on April 8, 1942 jointly commenced an antitrust action,[4] for damages and injunctive relief, against National, Paramount, RKO and Loew's (R 18a). Before any trial or hearing was had in that action the parties settled it. Specifically, on April 21, 1943, the plaintiffs and National signed a sublicense agreement whereby National agreed to sell plaintiffs supplies of such posters as were then under, or which might thereafter come under, National's exclusive control, and to permit the plaintiffs to distribute these posters, in competition

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[3] The film companies granted these licenses in consideration of National's agreement to share the profits (R 42a).

[4] Civil Action 2472, Eastern District of Pennsylvania (Supplemental Appendix).

with it, in the various localities in which the several plaintiffs had been doing business" (R 25a, 31a); and on April 23, 1943, all parties signed and filed a stipulation providing that "the action shall be dismissed with prejudice" (R 84a). On the same day the court signed an order reading "The action is dismissed with prejudice" (R 84a). This order was not founded on any independent consideration by the court, but was only a pro forma acceptance by the court of the naked stipulation of the parties.

Thereafter, at the times stated below, the other five major film companies granted National substantially the same exclusive licenses (R 18a, 51a-53a):

Universal Film Exchanges, Inc.—August 1, 1944
Columbia Pictures Corp.—April 22, 1945
United Artists Corp.—January 26, 1946
Warner Bros. Dist. Corp.—March 22, 1946
Twentieth Century-Fox Film Corp.—July 1, 1947

The present action, for damages and injunctive relief, was commenced against National and all eight film companies on August 18, 1949 (R 1a, 20a-23a). This action charged National, Paramount, RKO and Loew's with continuing to carry on the conspiracy alleged in the 1942 action, and charged the other five companies with having joined that conspiracy after the termination of the 1942 action (R 17a-18a). It also charged National with having monopolized the specialty-poster and trailer distribution businesses (R 12a-16a). The relief claimed in this action, is for restraints imposed and losses sustained since the termination of the 1942 action. More fully, the law of Pennsylvania establishes a six-year limitation period for tort actions of this kind,[6] and therefore petitioners claim only for losses sustained since August 18, 1943.

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[5] The sublicense granted petitioners authorized them to compete with National in the Philadelphia area only (R 31a).

[6] Act of March 27, 1913, 1 SM L 76 §1, 12 Purdon's Statutes §31.

With respect to the settlement agreement of the 1942 action petitioners averred that (R 18a):

> "(a) Plaintiffs aver that they entered into said contract against their will and only because they believed that if they refused to enter into the agreement they would be forced to abandon their business altogether; and that the said contract was not a fair or equitable settlement of the litigation but was intended by the defendants to be, and was in fact, a means of perpetuating and extending NATIONAL'S monopolization of the motion picture advertising business." [7]

On October 20, 1950, petitioners, and the plaintiffs in three companion cases, moved for summary judgment for injunctive relief on the basis of the documentary evidence at hand; and, on July 25, 1951, the District Court, in an opinion by McGranery, J., held that the motion should be granted with respect to National, but that with respect to the film companies the proof then before the Court was not sufficient to establish scienter summarily (R 60a-71a).[8] Because of the difficulty of framing an injunction against only one defendant (R 71a) no final decree was entered.

Before trial could be had on the merits, to wit, on November 6, 1953, the District Court, by Kirkpatrick J., entered an order dismissing the action as to all defendants on the ground that the dismissal of the 1942 action is a bar to the

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[7] As was stated in **Radio Corporation v. Raytheon Mfg. Co.**, 296 U. S. 495, 463, 80 L. ed. 327, 330, 56 S. Ct. 297, 299, the trial is the only place "where the bond between monopoly and surrender can be shown with certainty and fullness." The inherently oppressive nature of the agreement, however, is at least partially described in the opinion of Judge McGranery sur petitioners' motion for summary judgment, **infra**, particularly at pages 64a-65a, 67a, and the consequences of petitioners' trying to compete with National under the agreement are described in the amended complaint, 6a et seq., particularly in paragraphs 27a-48a. Cf. **Ring v. Spina**, 148 F. 2d 647, 653 (2 C. 1945).

[8] Reported at 99 F. Supp. 180.

maintenance of this action under the rules of res judicata (R 76a-83a). On March 30, 1954 the judgment of the District Court was affirmed by the court below.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals is in direct conflict with the decision of this Court in *United States v. International Bldg. Co.*, 345 U. S. 502, 97 L. ed. 1182, 73 S. Ct. 807 (1953). In that case, this Court settled the point that a voluntary withdrawal of an action, without any actual adjudication by the court, will not estop the plaintiff from reasserting the same basic contentions in a second suit on a claim for a subsequent period of time. More specifically, the Court held that the fact that the United States had agreed, in effect, to the entry of a consent judgment of dismissal, with prejudice, of a claim for additional income taxes for the years 1933, 1938 and 1939 was no obstacle to subsequent reassertion of the same contention ("challenging once more the correctness of the basis of depreciation"), for the years 1943, 1944 and 1945.[9] The Court concluded:

> "Certainly the judgments entered are res judicata of the tax claims for the years 1933, 1938 and 1939, whether or not the basis of the agreements on which they rest reached the merits. But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown

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[9] For other cases demonstrating the difference between repeating the same claim and suing on a right which accrued subsequently out of the same basic situation, see **Cromwell v. Sac County**, 94 U. S. 351, 24 L. ed. 195; **United States v. Moser**, 266 U. S. 236, 242, 69 L. ed. 262, 264, 45 S. Ct. 65, 67; **Tait v. Western Md. R. Co.**, 289 U. S. 620, 623, 77 L. ed. 1405, 1408, 53 S. Ct. 706, 707.

to be on the merits would forever foreclose inquiry into the merits. 345 U. S. at 506, 97 L. ed. at 1188, 73 S. Ct. at 809."

Opinion of the Court Below.

The gist of the opinion of the court below is found in one sentence, as follows (R 93):

> "Since plaintiffs by their consent judgment in 1942 had an adjudication against their claim at that time we do not think they improve their position by reiterating essentially the same complaint in 1949."

But it is clear that in *United States v. International Bldg. Co., supra,* this Court held that a judgment of dismissal based upon the consent of the parties, without hearing, is *not* an adjudication, and that there is *no* objection to a plaintiff's "reiterating essentially the same complaint" with reference to a later period of time after suffering such a dismissal.

It might be added that, when taken as a whole, the opinion is quite complex. It consists of two distinctly inconsistent parts. The first part proceeds on the basis that "No question of collateral estoppel by the former judgment is involved because the case was never tried * * *", and that, therefore, plaintiffs must be barred, if barred at all, on the ground that the two suits they commenced involve the same cause of action; but any such conclusion would be so manifestly untenable that the court had to give it up.[10] The last words said on it were: "All this leads up to the instant problem but does not solve it. We have a further difficulty" (R 92). At that point the court began the second part of its opinion in which it expounded the actual holding

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[10] Such a holding would be in direct conflict not only with **United States v. International Bldg. Co., supra,** but also with at least three other Supreme Court cases: **Cromwell v. Sac County, United States v. Moser** and **Tait v. Western Md. R. Co.,** cited **supra,** page 7, note 9.

of collateral estoppel, as epitomized in the sentence quoted above.

2. Even in the absence of a conflict with superior authority, issuance of certiorari would be appropriate here because of the devastating effect of the decision on the integrity of the antitrust laws. The public welfare demands that no such decision should be allowed to stand without a determination by this Court of its absolute necessity. The undeniable, most extraordinary fact is that every one of the eight major film companies has agreed, in writing, to exclude all of National's competitors from a supply of posters; and yet the court below actually decides that petitioners, and other small proprietors of poster service businesses,[11] who stand badly injured by this flagrantly monopolistic scheme, cannot even obtain an injunction against the carrying on of the monopoly in the future. No court has ever decided that the scheme is lawful. Only once has a court passed on the merits of the case, and that was when the petitioners, and others in like position, filed a motion in the District Court for summary judgment in equity. That motion came before former Judge McGranery, and he held, in a painstaking opinion, that the exclusive license agreements are on their face so obviously unlawful that National Screen Service Corporation should be enjoined summarily (R 60a-71a). But now the respondents are given the go ahead signal to continue operation of their monopoly with the assurance that their prime victims will always be found muted and defenseless. It is submitted that the anti-trust laws stand sorely in need of vindication at the hands of this Court.

3. Five of the eight respondent motion picture companies were not parties to the 1942 litigation and could not have

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[11] The record discloses that other poster renters are in the same position as petitioners with respect to the defense of res judicata (R 60a, 62a, Supplemental Appendix).

been made parties because they had not yet entered the conspiracy. Therefore the instant suit should not have been dismissed as to those companies even if it be assumed that the court correctly dismissed as to the others. The case cited by the court, *Brusewzski v. United States*, 181 F. 2d 419, does not support the decision. There the relation between the defendants existed at the time of the first suit and amounted to that of principal and agent, not merely that of joint tort feasors. Cf. *Bigelow v. Old Dominion C. Min. & S. Co.*, 225 U. S. 111, 56 L. ed. 1009, 32 S. Ct. 641.

WHEREFORE, this petition for issuance of a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1954 No. 163

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,

Petitioners

vs.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., 20TH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., WARNER BROS. PICTURES DISTRIBUTING CORP., PARAMOUNT FILM DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES, INC.,

Respondents

BRIEF FOR THE PETITIONERS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954 No. 163

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,

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Respondents

BRIEF FOR THE PETITIONERS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 153), is reported at 211 F. 2d 934. The opinion of the District Court (R. 76a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 30, 1954 (R. 158). The petition for certiorari was filed June 23, 1954 and granted October 14, 1954. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

I.

Whether a consent judgment of dismissal of an anti-trust action "with prejudice", but without any stipulation of facts, or adjudication by the court, will prevent the plaintiff from bringing a second action against the same parties, and based on continuance of the same conspiracy, but claiming relief only on the basis of restraints imposed and injuries suffered subsequent to the termination of the first action.

II.

If so, whether the plaintiff may maintain his action against persons who joined the conspiracy after the termination of the first action and who, therefore, were not parties to that action.

STATEMENT

Since December, 1940, petitioners have been engaged in the business of servicing motion picture exhibitors with the advertising signs and posters used in and around theatres (R. 43a). These posters are generally supplied on a rental basis, and the distributors are known as poster renters (R. 45a, 73a). Petitioners' operations are restricted to the Philadelphia area (R. 31a).

Respondent National Screen Service Corporation (hereinafter called National) also is a poster renter. It competes with petitioners in the Philadelphia area (R. 13a, 29a, 47a) but operates on a national scale (R. 11a, 56a).

The other respondents are the eight major American motion picture companies (R. 48a-49a). They control the production and initial disposition of the posters relating to their pictures (R. 10a-11a, 44a, 48a).

Prior to 1940, all poster renters could obtain supplies of posters by buying them directly from the film companies,

and supplies could sometimes be obtained by buying them from other poster renters, and from exhibitors who had bought them from the film companies (R. 30a, 44a-45a, 59a). The film companies themselves did not rent posters, but sold them, to all comers, at one price (R. 45a).

In January, 1940, two film companies—Paramount Film Distributing Corporation and RKO Radio Pictures, Inc.—entered into written agreements with National the effect of which was to enable National to obtain control of the entire output of the posters produced for the pictures of those companies[1] (R. 52a, 46a). Since a poster renter must offer supplies of posters of all major film companies, this arrangement appeared to sound the death knell for all renters other than National and, indeed, a large number promptly sold out to it (R. 46a, 72a-74a). Petitioners, however, and some others, found a way—"with difficulty and at a high price"—to buy a stopgap supply of Paramount and RKO posters from independent Canadian sources, and thus managed to remain in business (R. 47a), the other six film companies continuing, for the time being, to sell their posters to all renters, including National, on equal terms (R. 46a, 47a).

On February 6, 1942, however, a third film company —Loew's Incorporated—likewise gave National control of its posters (R. 17a-18a); whereupon, on April 8, 1942, petitioners, and other still-surviving independents, jointly commenced a treble damage and injunction action,[2] against National, Paramount, RKO and Loew's charging illegality of their exclusionary agreements under Sections 1 and 2 of the Sherman Antitrust Act (R. 18a). Before any trial or hearing was had in that action the parties settled it. Specifically, on April 21, 1943, the plaintiffs and National signed agreements whereby National agreed to permit each plaintiff to buy from it supplies of the posters controlled or to be

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[1] These agreements were on a share the profits basis (R. 42a).

[2] Civil Action 2472, Eastern District of Pennsylvania (R. 86-106).

controlled by it (R. 25a);[3] and, on April 26, 1943, all parties signed and filed a stipulation that "the action shall be dismissed with prejudice" (R. 84a). On the same day, and solely on the basis of the stipulation, the court signed an order reading: "The action is dismissed with prejudice" (R. 84a). Thereafter, all the other major film companies entered into similarly exclusionary agreements with National, viz.: Universal Film Exchanges, Inc., on August 1, 1944; Columbia Pictures Corp. on April 22, 1945; United Artists Corp. on January 26, 1946; Warner Bros. Distributing Corp. on March 22, 1946; Twentieth Century-Fox Film Corp. on July 1, 1947 (R. 18a, 51a-53a). This, of course, made it necessary for petitioners to obtain all their basic supplies from their competitor, National, or go out of business.

On August 18, 1949, petitioners commenced the instant action against National and all eight major film companies, again charging illegality of the exclusionary agreements and praying for treble damages and an injunction.[4] The damages claimed are for injuries sustained by petitioners as a result of restraints imposed since the termination of the 1942 action only. More fully, the law of Pennsylvania[5] establishes a six-year limitation period for tort actions of this kind, and therefore petitioners claim only for losses sustained from operation of the monopoly since August 16, 1943, or several months after termination of the 1942 action.

With respect to the settlement agreement of the 1942 action, the Amended Complaint in the instant action recited that (R. 18a):

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[3] This agreement had an original term of three years. It was renewed for an additional five year period on May 1, 1946, but since April 30, 1951 the supply of posters to petitioners and others in like position has been entirely dependent on the discretion of National. (R. 107)

[4] In this case petitioners complain of restrictions imposed on them by the settlement agreement as a condition of getting supplies, and of various unfair practices on the part of National, made possible by its monopoly position. (R. 11a-15a, 26a, 31a, 64a-65a, 67a)

[5] Act of March 27, 1913, 1 Sm. L. 721, 12 Purdon's Statutes §31.

"(a) Plaintiffs aver that they entered into said contract against their will and only because they believed that if they refused to enter into the agreement they would be forced to abandon their business altogether; and that the said contract was not a fair or equitable settlement of the litigation but, was intended by the defendants to be, and was in fact, a means of perpetuating and extending NATIONAL'S monopolization of the motion picture advertising business."

On October 20, 1950, petitioners moved for entry of summary judgment for injunctive relief, and, on July 27, 1951, McGranery, J., filed an opinion[6] holding that the motion should be granted with respect to National, but not with respect to the film companies (R. 60a-71a). Because of the difficulty of framing an injunction against only one defendant (R. 71a) no final decree was entered, but the correctness of Judge McGranery's conclusions on the merits has never been questioned by any other judge.

On November 6, 1953 the District Court, on motion, entered an order dismissing the action as to all respondents on the ground that the judgment of dismissal of the 1942 action bars this action absolutely under the law of res judicata (R. 76a-83a). On March 30, 1954, the judgment of the District Court was affirmed by the Court of Appeals for the Third Circuit (R. 153-158).

ARGUMENT

I.

The opinion below is in direct conflict with the decision of this Court in United States v. International Bldg. Co., 345 U. S. 502.

In that case, the facts were: In 1942 the United States

[6] Reported at 99 F. Supp. 180.

instituted proceedings against International Building Company for additional income taxes for the years 1933, 1938 and 1939 on the ground that the company had been using too high a figure as the basis for depreciating a certain building. While the case was pending in the Tax Court, but before trial or other hearing, the United States signed a stipulation stating: "It is hereby stipulated that there is no deficiency in Federal Income Tax due . . ." and the court entered a formal order in those terms. Thereafter the company continued using the same figure, and, in 1948, the United States again challenged its accuracy in a proceeding for additional taxes for the years 1943, 1944 and 1945. The company pleaded res judicata but this Court held the doctrine inapplicable.

The rule applied is that res judicata comes into play only (1) when an action is brought on the same claim, or cause of action, as that asserted in an antecedent action, or (2) when a point at issue has been adjudicated on the merits in an antecedent action.

The Court held that the two claims, or causes of action, asserted by the Government were not the same and that the consent judgment of dismissal could not be given the effect of an adjudication of the merits. The Court said:

> "Certainly the judgments are res judicata of the tax claims for the years 1933, 1938 and 1939, whether or not the basis of the agreements on which they rest reached the merits. But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause; it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits." (345 U. S. at 506).

All of this obviously applies to the instant case, and controls it absolutely.

It is hard to ascertain the position of the court below because the opinion contradicts itself. At the outset, the

court said positively that petitioners must be precluded, if precluded at all, on the ground that the two causes of action involved are the same. The court said there could be no preclusion on the basis of a prior adjudication because "the [first] case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter . . ." (Citing United States v. International Bldg. Co., supra). Therefore, said the court: "The decision of the case is going to depend upon whether the plaintiffs in the present suit are suing upon the 'same cause of action' as that upon which they sued in 1942 and lost." (R. 155) In the ensuing discussion, however, the court failed to answer this question in direct terms. On the contrary it drew a picture of extreme difficulty inherent in the question, cited no Supreme Court or other relevant authority, and concluded the discussion with the statement that: "Since plaintiffs by their consent judgment of 1942 had an adjudication against their claim at that time, we do not think they improve their position by reiterating essentially the same complaint in 1949." (R. 157)

Thus it appears that in the course of writing the opinion the court completely reversed its position.

On the other hand there is language in the opinion to the effect that since petitioners have sued twice on "the same course of wrongful conduct" they are in the position of one who has sued twice on the same claim, or cause of action. (R. 157)

That proposition, we submit, can hardly be taken seriously. It is enough to say that since the present cause of action did not come into being until after the commencement of the first action, the present claim could not have been included in the first action, and therefore the causes of action cannot be the same. Lawlor v. Loewe, 235 U. S. 522, 526; Connecticut Importing Co. v. Frankford Distilleries, 104 F. 2d 79, 81 (C. A. 2). This Court has met this situation in at least three res judicata cases in addition to the *International Case*, and in all of them the Court

assumed that difference of cause of action was so manifest that it would be taken for granted: Cromwell v. Sac County, 94 U. S. 351; United States v. Moser, 266 U. S. 263; Tait v. Western Md. R. Co., 289 U. S. 620.

With respect to the court's statement that "by their consent judgment of 1942 [plaintiffs] had an adjudication against their claim" it would be superfluous to say more than that it is in direct conflict with the express ruling of the *International Case*.

Finally, we submit, the distortion of the law of res judicata in this case is doubly harmful because it serves to promote violation of the antitrust laws. Petitioners complain of a continuing conspiracy. No court has ever found the complaint to be without merit. On the contrary, the only judge who ever looked into the merits found the principal defendant guilty (page 5, supra). Yet the opinion below would forever deny petitioners a hearing even on an application for an injunction to restrain future operation of the conspiracy. In this respect the opinion runs counter to the spirit of this Court's decision in Mercoid Corporation v. Mid Continent Investment Co., 320 U. S. 661, 669-670.

II.

The court did not state the grounds for dismissal of the case with respect to the five respondents who are not alleged to have been in the conspiracy prior to the termination of the 1942 action. Presumably, however, this part of the decision rests solely on the premise that the judgment entered in the 1942 case is equivalent to an adjudication of the merits, because it would be quite absurd to suggest that these separate claims, for different periods of time, against different tortfeasors, could constitute the same cause of action. As previously demonstrated, there has been nothing equivalent to an adjudication of the merits, but even if there had been these particular respondents would not be entitled to benefit by it: Bigelow v. Old Dominion C. Min. & Co., 225 U. S. 111.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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IN THE

Supreme Court of the United States

October Term, 1954 No. 163

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,

Petitioners

vs.

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., 20TH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., WARNER BROS. PICTURES DISTRIBUTING CORP., PARAMOUNT FILM DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES, INC.,

Respondents

REPLY BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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Respondents

REPLY BRIEF FOR PETITIONERS

The purpose in filing this brief is to note inaccurate statements in respondents' brief, and to reply only to the two points relied on by respondents, but not by the court below, and hence not covered in petitioners' original brief.

I.

AS TO RES JUDICATA

Respondents point out (R. 14-15) that none of the cases relied on by petitioners contained an application for an injunction, and they argue that a distinction lies in that difference.

at this time, the last contract having expired on April 30, 1951 (R. 107).

8. National retained the advantages of being the exclusive distributor of trailers and specialty posters, as a result of which it could, if it chose, take customers away from petitioners by tying in the renting of standard posters with the renting of specialty posters and trailers, and National has actually exercised that power (R. 12, 15, par. 31, 32, 45, 46, 47).

9. National had the power to injure petitioners in the competitive process by making late deliveries and this was frequently done (R. 13, par. 33-37).

Because of these facts, petitioners averred in their amended complaint that (R. 18):

> "(g) Plaintiffs aver that they entered into said contract against their will and only because they believed that if they refused to enter into the agreement they would be forced to abandon their business altogether; and that the said contract was not a fair or equitable settlement of the litigation but was intended by the defendants to be, and was in fact, a means of perpetuating and extending NATIONAL'S monopolization of the motion picture advertising business."

The situation was summarized in Judge McGranery's opinion sur motion for summary judgment as follows: (R. 67, 69)

> "National Screen's sub-licenses to the plaintiffs also demonstrate the exercise of monopoly power to gain a competitive advantage in violation of the antitrust laws. United States v. Griffith, supra. The agreements limit plaintiffs' operations geographically, in the source of supply they may utilize, and in the customers they may service. National Screen, therefore, not only possesses monopoly power and an intent

to exercise that power, but it has in fact exercised the power.

* * * * *

"The plaintiffs, therefore, face the threat of the irreparable injury of exclusion from competition by National Screen's monopoly, and they are entitled to injunctive relief against the monopoly under Section 16 of the Clayton Act."

In their statement of the case, page 7, respondents represent that: ". . . in depositions both petitioners have admitted, contrary to the allegations in their Amended Complaint, that they chose to accept the settlement of their 'own free will' (R. 122), 'voluntarily after considering the matter carefully' (R. 114-115, 129) . . ."

The facts are as follows: The petitioners were cross-examined on oral depositions by Mr. Nizer, counsel for National Screen Service Corporation, and the statements quoted in respondents' brief are statements made not by the witnesses, but by Mr. Nizer in framing his questions, which were obviously leading, and designed to present a one-sided view of the case. Moreover, the quoted statements are obviously fragmentary, and taken out of context. A reading of the whole of the testimony of the witnesses will show that they both fully backed up—as far as they were permitted by their cross-examiner—the allegations of their complaint that they signed the sublicense agreement unwillingly. Indeed, the depositions clearly establish that petitioners signed only because they lacked the financial resources to continue the fight. (See particularly R. 120, 121, 122, 123, 138, 139, 142, 142-43, 146)

We submit that the least that can be said for the petitioners is that a jury might find that they signed the sublicense agreement only because otherwise they "could not purchase or secure the goods necessary in the conduct of . . . [their] business": Eastman Kodak Co. v. Southern

Photo Materials Co., 273 U. S. 359, 377 (1927). And see also Ring v. Spina, 138 F. 2d 647, 653 (2 C. 1945); and compare Radio Corporation v. Raytheon Mfg. Co., 296 U. S. 459 (1935).

In their brief (p. 24) respondents admit that neither of the courts below adopted their contentions in this regard, as a result of which the point is offered as "an additional, independent ground in support of the judgment below." We submit that it provides no support. The cases cited by respondents are not in point because none of them involved the enforceability of a contract illegal under the antitrust laws.

III.

MISSTATEMENTS IN RESPONDENTS' BRIEF

1.

At page 2 (end of question 1) the five respondents who were not made parties to the first suit (Fox, Warner, Universal, Columbia and United Artists) are referred to as ". . . those whose participation in the alleged conspiracy was pleaded in the prior complaint though they were not named as parties." The actual averment in this regard is quoted below (R. 94-95):

> "26. At or about the same time the defendant-National by or through its wholly owned subsidiary Advertising Accessories, Inc., did negotiate with other major producers of motion pictures in an effort to secure similar exclusive distribution contracts. Such negotiations were with Universal Pictures, Inc., and Columbia Pictures, Inc., and subsequently with Twentieth Century-Fox Film Corporation and Warner Bros. Pictures, Inc.
>
> "27. Until the date of this complaint, these negotiations with Universal, Columbia, Fox and Warners have not been consummated."

There was no averment with respect to United Artists.

2.

At page 3, note 2, respondents refer to the reasons of the film companies for entering into the exclusive license agreements with National and state that: "Judge McGranery pointed out that the undisputed facts presented to him showed that the reasons . . . were legitimate business reasons [and] that the producers acted independently", but actually Judge McGranery said no such thing. With respect to the first point all that Judge McGranery said was that respondents' affidavits represented that their reasons were legitimate (R. 61) and with respect to the second point, all that the Judge said was that conclusive proof of joint action was not provided by the record presented to him in the summary judgment proceeding (R. 69, 70).

3.

At page 4, respondents assert that National's exclusive license contract with Loew's was a contract "to manufacture and distribute." Actually the contract was for distribution only (R. 54-56).

4.

At page 8 respondents unqualifiedly state that "the identity of the present claim with the prior one . . . has been conceded by the petitioners in the court below." No citation to the record is given and the statement is untrue.

5.

At page 5 respondents point out that the prices to be paid under the sub-license agreements were lower than those paid directly to film companies. What they fail to note is that the arrangement nevertheless involved an in-

crease in plaintiffs' overall cost of material because of postal expenses and the necessity of contracting to buy more supplies than might actually be needed (R. 131-137).

All of which is respectfully submitted.

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IN THE

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No. 163.

CHARLES LAWLOR and MITCHELL PANTZER, Co-Partners Trading as INDEPENDENT POSTER EXCHANGE,
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v.

NATIONAL SCREEN SERVICE CORPORATION, et *al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the district court (R. 76a) is not reported officially but is reported in CCH Trade Cases [1952-1953] ¶ 67,619. The opinion of the court of appeals (R. 89a) is reported at 211 F. 2d 934.

STATUTES INVOLVED.

The claim asserted by plaintiffs in the prior suit and here is a claim purporting to arise under the antitrust laws, but the questions presented do not involve the interpretation or application of those laws.

QUESTIONS PRESENTED.

1. Where plaintiffs earlier sued for damages and injunctive relief under the antitrust laws and then settled their claim and caused it to be dismissed with prejudice by the court, is their second action, asserting the same basic claim, barred as res judicata?

2. Where the prior antitrust suit attacked certain exclusive contracts between the defendants concerning the manufacture and distribution of copyrighted advertising poster materials, and the settlement of the suit was based on a license contract under which plaintiffs thereafter acquired the materials and covenanted not to challenge the arrangements in question, are plaintiffs estopped to sue again by their conduct in (a) entering into the license, under which they acquired not only the materials then being produced and distributed under exclusive contracts but also those as to which additional exclusive contracts might be made in the future, (b) voluntarily renewing the license at its expiration and (c) accepting down to the present time the benefits of the license and of the business arrangements complained of?

STATEMENT OF THE CASE.

Both courts below held this action barred as res judicata on the following facts:[1]

In April 1942, the present plaintiffs and other poster renters brought an antitrust suit in the District Court for the Eastern District of Pennsylvania against National Screen Service Corporation and three motion picture producers (respondents or affiliates of respondents here). The suit was on the same claim pleaded in the present action and for relief similar to the relief requested here.

The complaint in the prior suit[2] charged that National Screen had contracted with each of the three producer defendants for the exclusive right to distribute posters advertising the respective producers' motion pictures (SA 8-9, 14), that the contracts were, and were intended by National Screen to be, steps toward the establishment of a monopoly by National Screen (SA 9, 10, 13-14) and, further, that at the time the complaint was filed National Screen was negotiating similar exclusive contracts with four other producers (respondents, or affiliates of respondents here) (SA 9-10). The complaint in the prior action, as in the instant case, sought treble damages and injunctive relief which would have required the termination of the then-existing exclusive contracts between National Screen and the producers, would have prohibited entry by National Screen into exclusive contracts with any other producer, including those with whom the complaint alleged National Screen was then negotiating, and would have required the producer defendants to maintain supplies of advertising posters and make them available to plaintiffs.

---

1. The petition for certiorari states certain facts inaccurately, others in such a way as to create wholly erroneous impressions, but there is no point in discussion of such matters here since they do not bear on the questions presented.

2. The complaint is set forth in petitioners' "Supplemental Appendix to Petition for Certiorari", hereinafter cited "SA".

One year after the suit had been started, it was settled and dismissed with prejudice (R. 84a). The settlement was based on an agreement under which the plaintiffs entered into a "sublicense" contract with National Screen (R. 18a). The contract (R. 23a *et seq.*) provided that National Screen would furnish plaintiffs the posters National Screen was then under exclusive contracts with the producers to prepare and distribute and also those for which National Screen might in the future contract with other producers.

More than six years later, plaintiffs commenced the present action. The present amended complaint (R. 6a *et seq.*) makes the same charge of conspiracy and the same claim of illegal monopoly by virtue of the exclusive contracts between National Screen and the producers, and again seeks treble damages and injunctive relief.

The Court of Appeals for the Third Circuit (Judges Goodrich, McLaughlin and Hastie), unanimously affirming Chief Judge Kirkpatrick of the District Court, held that plaintiffs' present suit is based on "essentially the same course of wrongful conduct of which they complained" in the prior action and that the present suit is therefore barred (R. 93).

ARGUMENT.

The primary ground advanced to justify certiorari is a supposed conflict with **United States v. International Building Co.**, 345 U. S. 502 (1953), a tax case which held that there can be no **collateral estoppel** effect from a consent judgment, although such a judgment is clearly **res judicata** and a bar to reassertion of the same claim or cause of action (see the portion of the opinion quoted in the petition, p. 7). As both courts below recognized (R. 78a, 90a), the instant case does not involve any question of collateral estoppel. The decision that plaintiffs are barred in this action rests, not on collateral estoppel, but on the fact that the claim asserted here is the same claim that was dismissed with prejudice in the prior action.

Both courts concluded that the two actions were based on the same claim. Plaintiffs advance no argument here to refute that conclusion except to label it "manifestly untenable" and cite four cases which have no bearing at all on the question of the identity of the instant claim with the claim in the prior action (petition, p. 8 and n. 10); none of those cases involved a prior claim for **injunctive** relief against a continuing course of conduct (dismissed with prejudice) and a later suit on the same claim. In such a situation, a dismissal of the prior claim for injunctive relief bars reassertion of the claim.[3]

The crux of the case then is the factual identity of the present claim with the prior one. Plaintiffs have never disputed the identity of the underlying facts, and in any event we submit that this Court certainly should not exercise its discretionary certiorari jurisdiction to review the

3. The petition at several points suggests the argument which plaintiffs relied on below, namely, that the claim in the instant case is really a different one because damages are claimed for a later period. This argument, of course, ignores the fact that what was dismissed with prejudice in the prior case was not a mere damage claim but a claim for injunctive relief.

unanimous conclusion of two lower federal courts which have found the requisite factual identity.

Nor does this case involve the "devastating effect" on the antitrust laws suggested by petitioners. Stripped of its incendiary charges, their argument boils down to the startling proposition that private antitrust claims should be given special immunity from res judicata and other applicable principles of law.

Antitrust claims, like any others, have always been subject to such traditional defenses as res judicata, release, etc. *E.g.*, **Partmar Corp. v. Paramount Pictures Theatres Corp.**, 347 U. S. 89 (1954); **Duffy Theatres, Inc. v. Griffith Consolidated Theatres, Inc.**, 208 F. 2d 316 (10th Cir. 1953), *cert. denied*, 347 U. S. 935 (1954).

This is nothing more than a case of an asserted private right defeated by the affirmative defense of res judicata. There is no effect on the rights of any other private party whose case is not subject to such an affirmative defense,[4] and there is no effect on the rights of the Government.

The doctrine of res judicata has been fairly and justly applied on the facts of this case. If there were merit to plaintiffs' antitrust claim, they could have obtained from the court in the prior action an injunction to stop, thereafter, any violation of law found to exist. They would have restrained continuance of the very conditions they now allege have continued to injure them since the time they dismissed their first action with prejudice. But instead of prosecuting their first action to a conclusion plaintiffs chose to compromise their grievances by entering into the sublicense contract. It is perfectly apparent that they

4. Petitioners (p. 9) vaguely suggest a broad effect of the decision below on others similarly situated. The fact is that there were 13 plaintiffs in the prior action (SA 1). Only three of them have sued a second time, in the instant case and in two companion cases pending in the district court (Civil Action Nos. 11,136, 11,137), a fact of which we believe this Court may properly take judicial notice. There are four other companion cases (Civil Action Nos. 11,138, 11,376, 11,597, 11,678) not subject to the res judicata defense.

made this choice rather than face the hazards of litigation from which they might have emerged with nothing. If plaintiffs were permitted to avoid the res judicata consequences of their conduct under such circumstances as these, the policy that there be an end to litigation would be completely frustrated.

Petitioners' final contention, that their case is not barred as to those defendants who were not formally made parties in the prior action, is so obviously without merit that petitioners themselves did not even argue the point in the court of appeals,[5] or raise it in their petition for rehearing before the court en banc (R. 96). The holding below on this point (R. 93) adopted Chief Judge Kirkpatrick's reasoning, applying the rule of **Bruszewski v. United States**, 181 F. 2d 419 (3d Cir. 1950), that a plaintiff who has had his day in court does not get a second chance to assert the same claim against others when the relationship among all the defendants (co-conspirators under the allegations of the prior complaint as well as the present one) is close enough to require application of the doctrine of res judicata in favor of them all.

Petitioners do not mention here the second defense relied on by respondents in the courts below, namely an estoppel in pais arising out of plaintiffs' conduct in "accepting, renewing and still retaining without offering to surrender their license from National Screen" (R. 83a). Neither of the courts below found it necessary to pass on this defense in view of the complete disposition of the case on the res judicata point (see R. 83a). However, the estoppel is clear. Plaintiffs entered into the license from National Screen, expressly recognizing the validity of the existing exclusive contracts with the producers and the validity of similar contracts which might be entered into in the future (R. 26a) and expressly providing that plain-

5. Copies of petitioners' brief to the court of appeals have been lodged with the clerk of this Court.

tiffs would receive a supply of materials prepared by National Screen under any such future contracts (R. 24a). Plaintiffs have accepted all those benefits and are therefore subject to the familiar principle that one may not accept the benefits of an arrangement and then, later, attack its validity. See, *e.g.*, **McLean v. Clapp**, 141 U. S. 429 (1891); **Lyle Cashion Co. v. McKendrick**, 204 F. 2d 609 (5th Cir. 1953).

CONCLUSION.

The petition for certiorari should be denied.

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IN THE

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v.

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IN THE

Supreme Court of the United States.

October Term, 1954.

No. 163.

CHARLES LAWLOR AND MITCHELL PANTZER, Co-Partners Trading as INDEPENDENT POSTER EXCHANGE,

Petitioners,

v.

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the district court (R. 76) is not reported officially but is reported in CCH Trade Cases [1952-1953] ¶ 67,619. The opinion of the court of appeals (R. 153) is reported at 211 F. 2d 934.

STATUTES INVOLVED.

The claim asserted by petitioners in their prior suit and here is a claim purporting to arise under the antitrust laws, but the questions presented do not involve the interpretation or application of those laws.

QUESTIONS PRESENTED.

1. Where petitioners earlier sued for injunction and damages under the antitrust laws, charging that certain exclusive contracts between National Screen and the producer respondents constituted a conspiracy violative of the Sherman Act, and then settled their claim by entering judgment of dismissal with prejudice and accepting a sublicense to distribute National Screen's products manufactured by it under then-existing as well as subsequent exclusive contracts,—is their second action, asserting the same basic claim of invalidity of National Screen's exclusive contracts, barred as res judicata or may they relitigate the same contention? And does not res judicata apply to those whose participation in the alleged conspiracy was pleaded in the prior complaint though they were not named as parties?

2. Where the prior antitrust suit attacked certain exclusive contracts between respondents concerning the manufacture and distribution of copyrighted advertising poster materials, contending that they constituted a conspiracy in violation of the Sherman Act, and the settlement of the suit was based on a sublicense under which petitioners acquired the materials, are petitioners estopped to sue again and question the validity of the same exclusive contracts between respondents in view of their (a) entering into the sublicense under which they were to acquire not only the materials then being produced under respondents' existing exclusive contracts, but also those as to which additional exclusive contracts might be made by respondents in the future, and (b) voluntarily renewing the license at its expiration, under which license they have been carrying on their business for 12 years to the present time in competition with National Screen,—thus accepting the full benefit of National Screen's business arrangements?

STATEMENT OF THE CASE.

In April 1942, the petitioners and other poster renters brought an antitrust suit for injunction and damages in the District Court for the Eastern District of Pennsylvania against respondent National Screen Service Corporation (National Screen) and three motion picture producers (respondents or affiliates of respondents in the present case) (R. 86 *et seq.*). The gravamen of their complaint was that National Screen had embarked on an "illegal scheme" to monopolize trade in the distribution of certain motion picture poster advertising materials relating to the defendant producers' motion pictures (R. 98-99).

At one time, each of the respondent producers itself manufactured and distributed these copyrighted advertising materials to exhibitors (R. 44).

In 1939, Paramount Pictures, Inc.[1] licensed to National Screen the exclusive right to make and distribute for it, its advertising materials (R. 46, 52). In 1940, RKO Radio Pictures, Inc. (a respondent here) also made an agreement, solely for its material (R. 46, 52). In effect, these two motion picture companies discontinued their own manufacture and distribution of the materials and turned this function over to National Screen.[2]

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1. The then parent of the respondent Paramount Film Distributing Corporation (R. 19).

2. The reasons underlying these decisions by Paramount and RKO Radio appear in the opinion of Judge McGranery in the district court (R. 61). Judge McGranery pointed out that the undisputed facts presented to him showed that the reasons (not only with respect to these producers but also as to those who later licensed National Screen) were legitimate business reasons, that the producers acted independently (R. 69-70), and that National Screen was the only existing concern qualified to undertake the services which the producers required (R. 61). Petitioners have conceded that they "have never manufactured nor do they desire to manufacture any accessories" (R. 61 n. 2).

In December 1940, petitioners started their poster renting business in Philadelphia (R. 43, 47).

Early in 1942, Loew's Incorporated (also a respondent here) entered into an exclusive license agreement with National Screen to manufacture and distribute its advertising material.

Thereafter petitioners brought their 1942 antitrust suit against National Screen, Paramount Pictures, Inc., RKO Radio Pictures, Inc. and Loew's Incorporated.

The complaint in that case (R. 87 *et seq.*) charged that the exclusive licenses from Paramount, RKO Radio and Loew's were illegal and steps in National Screen's program to monopolize the distribution of advertising materials (R. 94, 98) and that by entering into those license agreements the producer defendants had conspired to aid in the establishment of such a monopoly (R. 94, 98-99). The complaint further charged that National Screen was then negotiating with other motion picture producers, specifically naming Universal Pictures Company, Inc., Columbia Pictures Corporation, Twentieth Century-Fox Film Corporation and Warner Bros. Pictures, Inc. (all respondents or affiliates of respondents here) (R. 94-95, 19, 20), and that it was National Screen's declared purpose to obtain exclusive licenses from all producers of motion pictures (R. 95). The complaint concluded with the allegation that the defendants were continuing their "illegal acts and practices", and that unless such acts and practices were restrained, the petitioners would suffer further damage (R. 103).

The complaint therefore sought injunctive relief, both preliminary and permanent (R. 103-105), as well as treble damages. Specifically, petitioners asked that National Screen and the producers which had already licensed National Screen be enjoined from continuing the exclusive license arrangements under attack, and that the court restrain National Screen from consummating any further

exclusive agreements "similar to those alleged herein to be illegal" (R. 104).

One year later, in April 1943, the suit was settled.

The settlement contract (R. 18, 23 *et seq.*), or sublicense agreement as it has been called, recited that National Screen was the licensee **under exclusive licenses** from motion picture producers for the manufacture and distribution of copyrighted material owned by the motion picture producers (R. 23), that it was **anticipated National Screen might in the future enter into exclusive license agreements** with other motion picture producers (R. 24), and that the parties desired to enter into a license for distribution by the petitioners of advertising materials manufactured by National Screen under its then-existing exclusive licenses **as well as under any exclusive licenses which it might acquire in the future** (R. 24).

The sublicense provided that National Screen would supply the advertising materials to the petitioners (R. 25, 26), at prices specified therein (R. 27, 39),—which were lower than the prices poster renters paid when they acquired such materials from motion picture producers which were distributing them (R. 110-113, 130-137). The petitioners covenanted that they would not thereafter contest the validity or scope of the licenses then or thereafter held by National Screen for distribution of advertising materials (R. 26). The sublicense was for a term of three years, to April 30, 1946 (R. 37).

Pursuant to the settlement of the litigation, the case was dismissed by stipulation and order of the court dated April 26, 1943 (R. 84). The dismissal, as provided not only in the stipulation but also in the district court's order, was with prejudice (R. 84).

As had been alleged in the complaint in the prior case and anticipated by the sublicense agreement settling the case, and as petitioners expected and desired (R. 24, 143), National Screen subsequently, and at different times over a period of years, entered into exclusive license agree-

ments with the other producer respondents (or affiliates): Universal in 1944 (R. 53), Columbia in 1945 (R. 51), United Artists and Warner Bros. in 1946 (R. 53), and Twentieth Century-Fox in 1947 (R. 52). When each new license agreement was made, petitioners, as provided in their sublicense agreement, were supplied with materials relating to the pictures of these companies (R. 117).

The sublicense agreement, originally for a term of three years (R. 37), was voluntarily renewed in 1946 by National Screen and petitioners for a further period of five years extending to April 30, 1951 (R. 107, 151), and it will not be disputed that petitioners have been supplied with materials to this date.

More than six years later, in August 1949, while the sublicense agreement was in full force, petitioners commenced their second action under the antitrust laws, the present suit charging the same conspiracy to monopolize by means of the same exclusive agreements which were the subject of their first action.

Their amended complaint (R. 6 *et seq.*) alleges that National Screen has now acquired exclusive licenses from all of the producer respondents (R. 11), and repeats the claim that the exclusive agreements between National Screen and the producers constitute a conspiracy to monopolize (R. 16, 18-20).

As in the prior case, the present amended complaint seeks to enjoin continuance of the exclusive contracts between National Screen and the producers and asks for treble damages (R. 20-22).

The amended complaint pleads the prior action and its settlement, but asserts that petitioners entered into the sublicense agreement "against their will and only because they believed that if they refused to enter into the agreement they would be forced to abandon their business altogether", and that the sublicense was not a fair or equitable settlement of the litigation but was intended to be a means

of perpetuating and extending National Screen's alleged scheme of monopolization (R. 18).

But in depositions both petitioners have admitted, contrary to the allegation in their amended complaint, that they chose to accept the settlement of their "own free will" (R. 122), "voluntarily after considering the matter carefully" (R. 114-115, 129), that the settlement was a business choice made under the guidance of their counsel (R. 116), and that they "were in complete agreement with respect to the settlement that was executed and the release which was given pursuant to it and the stipulation discontinuing the action with prejudice in the Federal Court" (R. 127-128). Moreover, petitioners conceded that most of their co-plaintiffs wanted the settlement (R. 121-122) and that their own counsel had indicated to them that they had no case and that he would withdraw if they did not accept the settlement (R. 147, 122, 140-142).

Petitioners have admitted that from the date of the settlement their business has progressed, earning larger profits as the years went on (R. 116, 149-151). The record shows that their annual gross more than doubled between 1942, the year before petitioners obtained the sublicense, and 1949, the year the present action was commenced (R. 150). And, of course, the profits increased as well (R. 151). Petitioners have never sought cancellation of the settlement agreement (R. 123), nor have they ever taken any legal steps to set aside the settlement (R. 116). On the contrary, they testified that they expected National Screen to live up to the sublicense contract (R. 123, 138).

On respondents' motion to dismiss, Chief Judge Kirkpatrick (R. 76 *et seq.*) held the prior action res judicata of this one on the ground that the same cause of action was asserted in both suits since both were "based upon anti-trust violations by means of the same exclusive license contracts to National Screen" (R. 76-77). The Court of Appeals for the Third Circuit (Judges Goodrich, McLaughlin and Hastie), in an opinion by Judge Goodrich, affirmed unanimously (R. 153 *et seq.*).

SUMMARY OF ARGUMENT.

I. This case does not involve any question of collateral estoppel. Since petitioners' suit is directed against the same alleged conspiracy claimed to have been effectuated by the same exclusive agreements as was their prior suit for injunctive relief, the judgment of dismissal with prejudice of the prior suit is res judicata and a complete bar.

The identity of the present claim with the prior one has been found by both courts below and has been conceded by petitioners in the courts below. The sole distinction asserted by petitioners is that they are seeking damages for a period subsequent to the dismissal of the prior action. Petitioners' present and prior cause of action is and always has been premised upon National Screen's exclusive contracts which petitioners asserted and now again assert constitute an illegal conspiracy violative of the Sherman Act.[3]

The consent dismissal with prejudice of the prior claim for injunctive relief would have no meaning at all, if notwithstanding such dismissal petitioners are permitted to reassert the same contention as to the alleged invalidity of the exclusive contracts and to seek damages for continuation of the very arrangements which petitioners participated in under the license agreement accepted in settlement and in which it was expressly provided that petitioners' sublicense would automatically embrace all future exclusive arrangements procured by National Screen. A holding that dismissal with prejudice of a claim for injunctive relief against an allegedly invalid business arrangement has no effect, would create a serious obstacle to the settlement of litigation and frustrate the policy of

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3. Petitioners' claim was never valid. Among other reasons, exclusive contracts are not illegal per se. **United States v. Bausch & Lomb Optical Co.**, 321 U. S. 707 (1944); **Restatement, Contracts** § 516(e) (1932). Since the only questions involved on this appeal are res judicata and estoppel in pais, we shall not pursue the merits further.

terminating litigation and encouraging settlements. On the other hand, the decisions below, barring these petitioners, are in no way inconsistent with the policy of the antitrust laws because this is an action asserting a mere private right on their part. There is no effect on the rights of other private plaintiffs or on the rights of the United States.

II. Petitioners' claim is and always has been based on the same ground, namely the alleged illegality of exclusive license agreements between National Screen and each of the producer respondents. That claim having been resolved against petitioners and in favor of National Screen by the 1943 judgment, petitioners may not renew the claim of illegality on the ground that some of the producer respondents which are parties to the contracts were not formally named as defendants in the prior action. This is especially so where, as here, the alleged illegal exclusive contracts of the respondents were all specifically charged by the prior action. Reliance on res judicata by the new defendants is fully justified either (1) under modern doctrines which have liberalized the requirement of mutuality or (2) under the traditional exception to that requirement where the liability of the prior defendants is determinative of the liability of the subsequent defendants as it is here inasmuch as the liability of all the respondents is dependent upon their identical relationship with National Screen.

III. Independently of res judicata, petitioners are estopped from maintaining this action. The applicable principle of estoppel is that acceptance of the benefits of a transaction precludes a party from challenging the validity of that transaction. Here, the estoppel arises out of petitioners' sublicense and their voluntary renewal of it in 1946. By the express provisions of the sublicense, petitioners (a) recognized the validity of, and covenanted not to challenge either National Screen's existing exclusive

licenses or any exclusive licenses which it might thereafter acquire, (b) obtained a supply of materials manufactured under the existing exclusive licenses, and (c) acquired the right to obtain, and did obtain a supply of materials manufactured under exclusive licenses thereafter entered into by National Screen with other producer respondents. Having voluntarily, and under the advice of their own counsel, entered into the 1943 settlement and accepted its benefits, petitioners may not now attack the very same exclusive licenses on which that settlement was premised. The respondents may not thus be punished for buying their peace.

Argument.

I.

THE DISMISSAL WITH PREJUDICE OF THE PRIOR ACTION IS RES JUDICATA AND A BAR TO THIS ONE.

The judgment below, and its unanimous affirmance by the court of appeals, rested solely and firmly on the identity of the present cause of action with that in the prior case and the consequent effect of the 1943 dismissal with prejudice as res judicata of the present action.[4]

The identity of the cause of action was cogently described by the trial judge. He said (R. 78-79):

> "The cause of action asserted in the present case is, to all intent and purposes, identical with that of the 1942 action. **The conspiracy charged is the same conspiracy. The contracts by which it was alleged to have been accomplished are the same contracts; and the same evidence, the same witnesses and the same documents would be necessary in the trial in both cases.** The fact that additional defendants have been added does not change it. The unlawful acts charged against the defendants in the 1942 action were not merely the making of the consummated and then existing license contracts with three of the present defendants, **but the complaint also charged that those licenses were a step in a general illegal scheme of monopolization and that the defendants were at that time engaged in the process of extending the monopoly** by negotiating similar contracts with other major producers, by which National Screen would acquire the exclusive distribution of all motion

4. There is no question of collateral estoppel in this case,—as both of the courts below readily recognized (R. 78, 154).

> picture advertising matter. The additional defendants sued in the present action are, admittedly, the other major producers referred to. * * *"[5]

The court of appeals not only agreed but, supplementing Judge Kirkpatrick's view, said (R. 157):

> "* * * But we think in substance the complaint is the same and that what plaintiffs object to is an alleged combination of the defendants to do illegal things harmful to the plaintiffs' business and acts done pursuant to that combination. Since plaintiffs by their consent judgment in 1942 had an adjudication against their claim at that time we do not think they improve their position by reiterating essentially the same complaint in 1949."

In light of the foregoing statement, petitioners are in error when they assert (p. 7) that the court of appeals failed to answer in direct terms the question whether the cause of action is the same.

Indeed, in the courts below, petitioners themselves conceded the identity of the basic claim asserted in the prior and present actions. Thus, in their court of appeals brief, petitioners admitted (p. 6 n. 6):[6]

> "Plaintiffs concede that the exclusive license agreements on which this [prior] action was based were substantially the same as the contracts on which the instant action is based. In fact, in the case of Loew's the same contract appears in both actions."

Moreover, one of the petitioners himself testified that he understood the grievances which he was asserting in the

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5. Wherever boldface type is used in this brief, the emphasis is ours.

6. Copies of petitioners' brief to the court of appeals have been lodged with the clerk of this Court.

prior action and that he knows the same grievances are asserted in the present action (R. 126).

In an effort to create the appearance of different causes of action, petitioners speciously argue (p. 7) that since the damages they now seek for a period subsequent in time to the prior judgment could not have been included in the first action, "therefore the causes of action could not have been the same".

But petitioners disregard the crucial fact that a consent judgment with prejudice is the "equivalent of a retraxit at common law" [2 **Freeman, Judgments** § 757 (5th ed. 1925)] and amounts "to such an adjustment of the merits of the controversy * * * as will constitute a defence to another action brought upon the same cause of action." **United States v. Parker,** 120 U. S. 89, 95 (1887). Consequently, the prior judgment judicially established **between the parties** that the exclusive agreements between National Screen and the producer respondents did not constitute an actionable conspiracy against petitioners. Accordingly, there can be no alleged damages for any subsequent period arising out of agreements which the prior consent judgment adjudicated were not wrongful or actionable.

Petitioners' only contention in seeking reversal of the judgment below is that the district court and the court of appeals were wrong in holding that petitioners' present suit is on the same cause of action as their prior one. The only cases cited by petitioners as supporting the contention that there is a new cause of action are **Lawlor v. Loewe,** 235 U. S. 522, 536 (1915), and **Connecticut Importing Co. v. Frankford Distilleries,** 101 F. 2d 79, 81 (2d Cir. 1939). But neither case dealt even remotely with identity of causes of action. The sole question in both cases was the right of a plaintiff, who had established a violation of the antitrust laws, to recover damages accruing after commencement of the action. In the instant case, petitioners are attempting to maintain an action based on the same exclusive contracts

which the judgment in the prior action established were not tortious as against them. Where a wrong has been established, its continuance remains actionable. Where the status of certain contracts has been held lawful, their continuance cannot become actionable (see Judge Kirkpatrick's analysis, R. 79-80).

United States v. International Building Co., 345 U. S. 502 (1953), upon which petitioners rely, involves the doctrine of collateral estoppel arising out of a prior determination of a fact in a trial of a different cause of action.

In the present action, the courts below correctly concluded that the causes of action being identical it was unnecessary to inquire whether collateral estoppel could be invoked since the more comprehensive principle of res judicata was clearly applicable. It was because res judicata applied,—and not collateral estoppel,—that both courts below relied upon **United States v. Parker**, 120 U. S. 89 (1887), and deemed **United States v. International Building Co.**, 345 U. S. 502 (1953), inapplicable (R. 78, 155).

In contending that there are different causes of action, petitioners also ignore the fact that their prior action sought **injunctive relief which, if granted, would have restrained the very same exclusive agreements of which they complain in their present action.** It is the accepted general rule that a judgment **for the defendant** in a suit seeking injunctive relief is a bar to relitigation of the same claim. **Restatement, Judgments** § 46, comments *a*, *b* (1942). Significantly, petitioners fail to cite a single case involving a claim for injunctive relief.

If petitioners were permitted to maintain their present action, it would necessarily mean that the dismissal with prejudice of the prior action for **injunctive** relief was without significance. Petitioners could have accepted the sublicense agreement, gone through the motions of the dismissal with prejudice, and the very next day started a new

antitrust suit for the identical injunctive relief which they had abandoned with prejudice the day before.

Such conduct would shock the conscience of equity. And a rule of law permitting it would have far-reaching consequences. If this Court should hold that a voluntary dismissal with prejudice of a claim for injunctive relief does not bar reassertion of the same claim at a later date and bar recovery of damages thereafter accruing, it will be impossible to settle many cases, private antitrust cases in particular.

There are many situations in which a plaintiff who challenges the lawfulness of a course of conduct is willing that it continue **insofar as he is concerned** if he obtains sufficient concessions from a defendant desirous of avoiding burdensome litigation. But incentive for buying one's peace would be destroyed if settlement were merely entrapment, and the grievance survived the mutual intention of the parties to terminate the quarrel. Such a rule would be contrary to public policy which encourages settlement of litigation.

Respect for the doctrine of res judicata does not violate the policy of the antitrust laws, nor is it inimical to their enforcement, as petitioners suggest (p. 8). This is purely a private suit in the business and pecuniary interest of these petitioners, barred by the rulings of the courts below solely because of these petitioners' own deliberate conduct, their own voluntary agreement in 1943 that it should be barred. Others who think themselves aggrieved are free to sue.[7] The United States is free to sue. In **this** case we are concerned solely with the unconscionable insistence of the present petitioners,—who voluntarily settled

7. This is a particularly significant consideration in the present case because there are four companion cases, brought by poster renters, pending in the district court, in which no res judicata defense has been or can be asserted (Civil Action Nos. 11,138, 11,376, 11,597, 11,678).

their claim, entered judgment dismissing the complaint with prejudice, accepted the benefits of a settlement contract, and renewed their sublicense agreement three years later,—that they may at the same time disregard judgment and settlement benefits and sue again on the same grievance.

II.

THE ALLEGED CO-CONSPIRATORS WHO WERE NOT MADE PARTIES TO THE PRIOR ACTION MAY ALSO RELY ON THE DEFENSE OF RES JUDICATA.

Three of the producer respondents (or affiliates) were named as parties to the prior action. The claim there, for injunction against producers' continued use of National Screen to perform their former functions in the production and distribution of advertising materials, was dismissed with prejudice in exchange for an agreement that National Screen would thereafter supply the materials to petitioners. Stated differently, petitioners dismissed with prejudice their action to enjoin continuation of an alleged conspiracy to permit National Screen to monopolize the distribution of the advertising poster materials by obtaining exclusive licenses from **all** motion picture producers.

Had petitioners been able to establish their claim, not only would the three then-existing licenses have been enjoined, but National Screen would have been enjoined also from entering into the later exclusive contracts with the other five producer respondents. But the consent judgment of dismissal judicially established that the later contracts could not be enjoined by these petitioners. The mere circumstance that petitioners failed to name some of the producers as formal parties defendant in the prior action cannot vitiate the legal effect of the judgment to which petitioners consented.

Petitioners, realizing the force of these facts, did not even raise or argue this question in the court of appeals.[8] That court nevertheless did discuss and approve the district court's holding.

The district court and the court of appeals, in holding petitioners barred as against all respondents, adopted and followed the reasoning of Judge Hastie in the case of **Bruszewski v. United States**, 181 F. 2d 419 (3d Cir. 1950), *cert. denied*, 340 U. S. 865 (1950). In that case, Judge Hastie rejected the technical requirement of mutuality as a condition to use of res judicata as a bar. A longshoreman, injured while working on a vessel owned by the United States, sued the steamship company which was servicing the ship under a General Agency Service agreement. When he lost that suit, he sued the United States for the same injury. The court held that he was barred by the prior decision, even though there was no mutuality (since the United States would not have been bound by a judgment against the steamship company) and no privity between the United States and the steamship company. Judge Hastie said, 181 F. 2d at 422:

> "Where different plaintiffs sue the same defendant in successive suits, many courts have questioned the fairness of invoking *res judicata* against the defendant unless a significant relationship can be found between the plaintiffs. But where, as in this case, *res judicata* is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts have, as indicated in the cases above cited, enlarged the area of *res judicata* beyond any definable categories of privity between the defendants. Certainly the cases already cited show that the moving party has been bound by prior adjudication against him in situations where the relation between successive

8. See their brief in that court, copies of which have been lodged with the clerk of this Court.

defendants was no closer or more significant than that between the United States and Isthmian Steamship Company here. We are in accord with this development of the law away from formalism which impedes the achievement of fair and desirable results."

Similar reasoning has been adopted by other courts. **Coca Cola Co. v. Pepsi Cola Co.**, 36 Del. 124, 172 A. 260 (1934); **Good Health Dairy Products Corp. v. Emery**, 275 N. Y. 14, 18, 9 N. E. 2d 758, 759 (1937). *Cf.* the opinion of Judge Augustus Hand for the court in **Adriaanse v. United States**, 184 F. 2d 968 (2d Cir. 1950).

Under the view of these cases, the petitioners here are barred as against all respondents, without regard to the factual relationship among the respondents under petitioners' own allegations. That view, as so forcefully presented in Judge Hastie's **Bruszewski** opinion, best serves the policy of ending litigation and should, we submit, be approved by this Court.

However, it is not necessary in this case to go that far, because here the relationship of all the producer respondents to National Screen is such that the case falls within a well established exception to the requirement of mutuality, —an exception which this Court recognized in **Bigelow v. Old Dominion Copper Mining and Smelting Co.**, 225 U. S. 111 (1912), relied on by petitioners (p. 8).

In the **Bigelow** case, an action was brought in a federal court in New York against Lewisohn to recover unlawful profits realized by him and his associate, Bigelow. A similar action was brought in a Massachusetts court against Bigelow. In the New York action Lewisohn's demurrer was sustained. The Massachusetts court held that Bigelow was not protected by the judgment in favor of Lewisohn in the federal court in New York. This Court affirmed, holding that the full faith and credit clause of the Constitution did not require the Massachusetts court to hold the

New York judgment in favor of Lewisohn a bar to the Massachusetts action by the same plaintiff against Bigelow. While reaffirming and applying the rule that the applicability of res judicata generally requires mutuality, the Court recognized (225 U. S. at 127-128) that:

> "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependant upon the culpability of one exonerated in a prior suit, upon the same facts, when sued by the same plaintiff. See *Portland Gold Mining Co. v. Stratton's Independence*, 158 Fed. Rep. 63, where the cases are collected. The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. * * *"

In holding that the case before it fell within the rule rather than the exception, the Court said, at 128:

> "It is too evident to need argument that the remedy of this plaintiff does not depend upon the culpable conduct of Lewisohn, but upon Bigelow's own wrong, whether alone or in cooperation with Lewisohn. * * *"

Under the facts of the instant case, as pleaded in the prior and present complaints, the producer respondents could not have been liable to petitioners if National Screen was not liable, since the gravamen of the complaint was the contracts between National Screen and the producers. Thus, petitioners' remedy against any producer must depend on the producer's action in entering into a contract with National Screen and cannot depend on the producer's action alone. See **Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.**, 248 U. S. 55, 62 (1918).

In short, the liability of the additional producers who have been named in the present action "is altogether de-

pendant upon the culpability of" National Screen and therefore unilateral application of res judicata against petitioners, who dismissed their prior action against National Screen, is justified.[9]

The exception to the general rule of mutuality noted in the **Bigelow** case has a long history and a considerable body of supporting authority. See, as typical cases in which mutuality of estoppel has been held not necessary for the application of res judicata, **Bernhard v. Bank of America**, 19 Cal. 2d 807, 122 P. 2d 892 (1942); **Silva v. Brown**, 319 Mass. 466, 66 N. E. 2d 349 (1946); **Jones v. Valisi**, 111 Vt. 481, 18 A. 2d 179 (1941). In **Bernhard v. Bank of America**, *supra* at 812-813, 122 P. 2d at 895, the court expressed the rule as follows:

> "* * * The courts of most jurisdictions [have recognized] a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. * * * The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries."

It is apparent from review of the cases cited under this point of our argument that the overwhelming judicial tendency has been to find a way to grant relief against the kind of repetitious litigation which would be permissible under strict application of the mutuality requirement. The

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9. It is perhaps unnecessary to add that the applicability of res judicata in the present case would not be affected by the fact that the first suit was disposed of by petitioners' consent. **Portland Gold Mining Co. v. Stratton's Independence**, 158 Fed. 63, 65 (8th Cir. 1907), cited in the **Bigelow** case.

legal paths to that result have varied. The **Bruszewski** view completely discards the requirement of mutuality. Other cases recognize the requirement, but allow an exception for dependent liability. And even those authorities which pay complete lip service to technical mutuality still reach a desirable result by a broad approach to the concept of "privity". See Judge Goodrich's concurring opinion in the **Bruszewski** case, 181 F. 2d at 423; **Emery v. Fowler**, 39 Me. 326 (1885), and the cases there discussed (pp. 329-331).

But whatever the legal path, the result is the same. The facts of this case require that result. For here the prior judgment has judicially established that petitioners have no cause of action based on the exclusive contracts. Therefore, all of the respondents which are parties to such contracts are entitled to the bar of the 1943 judgment. The trial court and the court of appeals properly so held.

III.

PETITIONERS ARE ESTOPPED FROM MAINTAINING THE PRESENT ACTION BY THEIR ACCEPTANCE, RENEWAL AND RETENTION OF THE BENEFITS OF THEIR SUBLICENSE FROM NATIONAL SCREEN.

Independently of res judicata, petitioners are barred from maintaining the present action by estoppel in pais,—under the familiar principle that one who accepts the benefits of a transaction with full awareness of the facts may not thereafter be heard to challenge the validity of the transaction.

In this case, in voluntarily and deliberately settling and terminating the prior action petitioners not only consented to entry of the judgment of dismissal with prejudice, but at the same time obtained a sublicense agreement from National Screen (R. 18) which gave petitioners a full supply of the materials which National

Screen manufactured under its exclusive agreements with the producer respondents (R. 23-40). Moreover, in that very sublicense agreement, petitioners not only expressly recognized the validity of respondents' then existing and future exclusive contracts and covenanted not to challenge them (R. 26) but procured thereunder the right to receive,—and did in fact receive (R. 117),—from National Screen all materials which National Screen thereafter manufactured under subsequently acquired exclusive contracts with other motion picture producers (R. 24, 26).

Furthermore, shortly prior to May 1946, when the original sublicense agreement with petitioners would have terminated, petitioners procured from National Screen a renewal of the sublicense (R. 107, 151).

Three years later, in the midst of the renewal period, petitioners instituted the present action for triple damages in which they attack as invalid the very same exclusive contracts which they have expressly agreed were valid as to them. The law is clear that by the acceptance of the sublicense and its renewal, petitioners are estopped from challenging the validity of the exclusive contracts out of which National Screen's sublicense to petitioners arises.

This Court has applied this principle in a case in which the plaintiff sought to set aside a settlement of prior litigation. In **McLean v. Clapp**, 141 U. S. 429, 432-433 (1891), it was held:

> "• • • The settlement was a new contract between [plaintiff] and Clapp, and the law is clear that he cannot take the benefits of that contract and repudiate its burdens. • • •
>
> "• • • His conduct, after full knowledge, ratified and affirmed the settlement • • •".

In **United States** *ex rel.* **The International Contracting Co. v. Lamont**, 155 U. S. 303 (1894), this Court held that the International Company, which had entered into and performed a dredging contract, was estopped to assert the in-

validity of that contract and to claim higher compensation on the basis of a previous bid which had not resulted in a contract. Mr. Justice White explained the estoppel principle as follows, at 309-310:

> "* * * He entered of his own accord into the second contract and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract. * * * Nor does the fact that in making his second contract, the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them, he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences. * * *"

A case strikingly in point on the application of estoppel in an antitrust case is **Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Ltd.**, 185 F. 2d 196 (9th Cir. 1950), *cert. denied*, 340 U. S. 943 (1951). There, plaintiffs charged a conspiracy to monopolize the mining, processing and distributing of borax. Although the conspiracy was alleged to have begun in 1929 and continued until 1945 (185 F. 2d at 199-200), the court held that the plaintiffs were bound by a general release given in 1942. The complaint alleged that the conspiracy and the acts of monopolization which had continued until 1945 included coercive inducement of the 1942 release (*id.* at 200). Simultaneously with the giving of the release, the plaintiffs had entered into an agreement with one of the defendants, whereby plaintiffs sold certain property. The court referred to this agreement as a "settlement agreement" (*id.* at 201), but it did not have the striking additional attributes of the instant

settlement agreement which expressly recognized the validity of the exclusive contracts and any future contracts with other producers for the right to manufacture their poster advertising accessories.

Nevertheless, the court held that this agreement in conjunction with the release as to past grievances constituted a complete defense. The language of the court of appeals (185 F. 2d at 208) is precisely pertinent here:

> "The record induces the firm conviction that by the 1942 agreement and sale, the parties thereto were voluntarily wiping the slate completely clean of controversies by a full settlement of any and all existing differences between them. **We are not aware of any principle of law which requires private monopolists to be treated in any different fashion than other tort feasors in the matter of entering into binding private settlement agreements arising out of demands against them for damages.** Such settlements in no wise obstruct possible criminal prosecutions which might be instituted by the Government, nor do they defeat the Congressional purpose of allowing private claimants in this class of actions the right of redress of their grievances in our courts. * * *"

For additional cases to the same effect, see **Insurance Co. v. Mowry**, 96 U. S. 544, 547 (1877); **Dickerson v. Colgrove**, 100 U. S. 578, 580 (1879); **Mahoning Investment Co. v. United States**, 3 F. Supp. 622 (Ct. Cl. 1933), *cert. denied*, 291 U. S. 675 (1934); **Chipman v. Montgomery**, 63 N. Y. 221, 234-235 (1875).

Since the courts below deemed res judicata completely dispositive of the cause, they did not deal with the doctrine of estoppel, although the district court reviewed the elements of estoppel present in this case (R. 83). We submit that the estoppel arising from these elements likewise precludes maintenance of this action and therefore provides an additional, independent ground in support of the judg-

ment below. This Court, of course, may affirm that judgment on any ground. **Ryerson v. United States**, 312 U. S. 405, 408 (1941).

CONCLUSION.

Affirmance is earned first, on the traditional legal doctrine which seeks to put terminus and finality to litigation and abjures relitigation under whatever devious guise; and second, on the traditional equitable doctrine that one may not enter into a settlement, persist in its gains for a decade, and simultaneously attack it collaterally without disavowing its continuing benefits and seek punitive relief as if such settlement had never been made.

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 163.

CHARLES LAWLOR and MITCHELL PANTZER, Co-Partners Trading as INDEPENDENT POSTER EXCHANGE,
Petitioners,

v.

NATIONAL SCREEN SERVICE CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR RESPONDENTS.

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REPLY BRIEF FOR RESPONDENTS.

I. RES JUDICATA.

Petitioners' Reply Brief disfigures our argument about the injunctive remedy sought in their prior action as if we raised merely a quibble between legal and equitable relief. Surely petitioners must suspect a deeper purpose or they would not address themselves to this point as the major focus of reply.

The significance of the prayer for injunctive relief in the prior action is that the judgment of dismissal with prejudice established that petitioners were not entitled to enjoin the acts of which they now complain and again seek to enjoin. (The authorities are cited at page 13 of our original brief.)

The prayer to enjoin in both actions only italicizes the applicability of res judicata. For since the cause of action was the same, respondents' future conduct, which is the sole pretense for justifying the second suit, could have been prevented by judicial edict, if petitioners had pursued their prior action and been able to sustain it. Instead [admitting that they were advised by their own counsel that they "had no case" (R. 147)], they surrendered their legal and injunctive remedy with the same effect as if judgment had been rendered for the defendants after trial. 2 **Freeman, Judgments** § 757 (5th ed. 1925); **United States v. Parker**, 120 U. S. 89, 95 (1887). If res judicata should not bar an action for injunction where the basic claim is the same, and the acts judicially established to be valid (in so far as these petitioners are concerned) may again be challenged in the future, then settlement would be a pause rather than a stop in litigation.

Petitioners cannot and do not dispute the identity of the basic claim asserted in the prior and present actions. In the lower courts the identity was expressly conceded.

In their brief in the district court petitioners flatly wrote (p. 2):

> "• • • The complaints filed in these actions are substantially alike and both actions are based on the same alleged illegal contracts. • • •"

In the court of appeals, petitioners repeated this concession (p. 6 n. 6):

> "Plaintiffs concede that the exclusive license agreements on which this [prior] action was based were substantially the same as the contracts on which the instant action is based. In fact, in the case of Loew's the same contract appears in both actions."

Petitioner himself testified (R. 126):

> "Q. When the complaint was filed in the former action did you read it?
>
> "A. Yes.
>
> • • •
>
> "Q. And you know that the same grievances are asserted in your present action against National Screen, don't you?
>
> "A. Yes."

Both lower courts found identity of the cause of action after close examination of the complaints (R. 78-79, 157). Petitioners' concessions only pointed to the inevitability of this ruling. It is this identity which is the determinative factor for preclusive adjudication. The prayer for injunction in the prior action only garnishes the conclusion by demonstrating the emptiness of petitioners' contention that continued conduct (already held valid) justifies relitigation.

II. ESTOPPEL.

Petitioners' Reply Brief purports to respond to our argument of estoppel under the heading "Reply to Argument on Pari Delicto". We have never asserted "pari delicto", and this is a bolder attempt at semantic transmutation than is ordinarily encountered. Estoppel is based on the traditional doctrine that participation in contract relationship estops the beneficiary from challenging it while pocketing its resultant proceeds. We have always insisted that the exclusive contracts were lawful and therefore there was no "delictum" in which petitioners could participate.

Seeking to escape from estoppel, petitioners decry the settlement agreement made by them in 1943 and renewed in 1946 stating (p. 3): "The fact is that petitioners received few if any benefits" therefrom. There follows a listing (inaccurate to boot) of the "principal burdens and disadvantages" in the settlement sublicense agreement.

The principal benefits and advantages are ignored. We shall not list them, nor seek to establish the overwhelming favorable balance to petitioners. It is to be noted that after the surrender by National Screen of its exclusivity so as to afford sublicenses to petitioners and others for its copyrighted posters, petitioners as they concede doubled their business (R. 116, 150) and increased their profits (R. 116).

But we do not conceive that any court will review a settlement agreement, 12 years after the parties have lived under its roof and accepted its shelter, for the purpose of determining in a collateral proceeding whether it was advantageous to one of the parties. If settlement agreements, or any other contracts, had to pass muster on retrospective examination as to whether the scales of benefits and burdens are precisely balanced, how many would survive?

Petitioners' claim of duress because they signed the settlement agreement "only because they lacked the financial resources to continue the fight" (p. 5), even if true, is not duress. Such a standard would subject every settlement to a subsequent test of validity based on the financial status of the parties. If financial distress at the time of making a contract is to be deemed an exoneration from it, would it not follow that inquiry should be made of other distressful pressures, such as ill health or family difficulties? Judge Kirkpatrick defined "duress" as a legal concept (R. 81) and properly rejected petitioners' contention with understandable asperity when he wrote (R. 81-82):

> "* * * Reading the complaint, one is forced to the conclusion that, unless the plaintiffs believed either that they could not prevail in the action or that the Court was incapable of granting relief, they must have settled because they found it more advantageous to accept a license than to pursue their action. They

were represented by counsel and consummated the settlement by consenting to a judgment against themselves. The fact that a party, for whatever reason, finds that the advantages of a settlement outweigh the advantages of pursuing the law suit does not constitute duress. Considerations unconnected with the subject matter of the suit, including the business situation of the parties and economic pressures, enter into most settlements, and there are hardly any of them that could not be attacked on the same kind of grounds that the plaintiffs here allege. * * *"

A unanimous court of appeals succinctly underlined this judicial answer to petitioners' present contention. Judge Goodrich wrote (R. 157-158):

> "The plaintiffs claim that the 1942 suit was settled because of 'duress'. Of course it is not suggested that there was any physical compulsion. What is meant is that their economic position was such that this was the best settlement they could get. It is well settled that merely because one enters into an agreement which he would not enter if he did not need the money there is not such duress as will void the contract. See Rector v. Suncrest Co., 52 F. 2d 946 (C. A. 4, 1931); and Restatement, Contracts § 494 (1932)."

The petitioners quarrel with our citations of their admissions that there was no duress, on the ground that questions put to them "were obviously leading" (p. 5). But it is not denied that petitioners answered in the affirmative time and time again, making a shambles of the present preposterous "duress" theory, since they executed general release (R. 114, 127), signed sublicense settlement agreement (R. 113, 123), advised with counsel (R. 119, 123, 128, 149) and other plaintiffs (R. 114, 121; 127-8), executed renewal sublicense agreement three years later (R. 107, 151), insisted upon receiving materials thereunder for 12

years to this day (materials fabricated under then existing exclusive arrangements as well as under subsequently acquired agreements) (R. 116, 117, 130), never offered to surrender the sublicense, and on the contrary always insisted that it be kept alive (R. 116, 123).

III. ACCURACY.

The prejudicial charge of inaccuracy made in petitioners' Reply Brief is totally unwarranted. Below is confirmation of every original statement:

1. The five respondents who were not named as parties to the prior action **were** there charged as participants in the alleged conspiracy. The charge of conspiracy against the producers in the present case is based on the making of the exclusive licenses with National Screen, and the prior complaint unquestionably charged that National Screen was attempting to make such licenses with all motion picture producers. Petitioners quote from two paragraphs of the prior complaint and emphasize that one of the five new defendants was not there identified by name, but they fail to refer to another paragraph (R. 95):

> "30. On or about the date of these transactions, the defendant-National inaugurated, has since actively pursued and is now engaged in enforcing and maintaining a policy and practice whereby it intends to acquire the exclusive distribution privileges of all motion picture advertising matter prepared and distributed by **all the producers of motion pictures**, and the acts herein recited are all part of and in pursuance of said plan and policy."[1]

2. Our reference to Judge McGranery's statement as to the producers' valid motivations in concluding exclusive licenses with National Screen was correct. Judge McGranery said (R. 69-70):

---

1. Wherever boldface type is used in this brief, the emphasis is ours.

> "* * * The affidavits submitted by the defendants **clearly indicate** that each producer-distributor entered into its agreement with National Screen **independently, for legitimate business reasons related to its own enterprise** * * *."

3. Petitioners make a point of the fact that the printed excerpts from the contract between Loew's Incorporated and National Screen refer to distribution only (R. 54-56). Since none of the contract provisions is relevant to the issues on this appeal, the present record contains only the fragmentary provisions from the Loew's contract printed by petitioners in the court of appeals.

However, the relevant portions of all the contracts were before the district court (R. 49-53), and both Judge McGranery and Chief Judge Kirkpatrick recognized that the contracts were licenses for manufacture as well as distribution and that National Screen in fact performs both functions (R. 61, 64 n. 7, 67, 76). Furthermore, petitioners' own amended complaint similarly characterized the contracts (R. 11):

> "24. Plaintiff is informed, believes and therefore avers, that defendant NATIONAL has obtained from defendant-producers exclusive contracts for the **preparation** and distribution of standard accessories and advertising materials * * *."

Both petitioners have stated the same fact under oath, one in an affidavit (R. 46), and both of them in oral testimony (R. 114, 136).

4. The statement at page 8 of our original brief (in the Summary of Argument), calling attention to petitioners' previous concession of the identity of the cause of action, is set forth more fully, and with quotation of petitioners' own language, at page 12 of the brief. And see pages 2-3 *supra*.

5. Petitioners' assertion that the sublicense agreement resulted in an overall increase in their cost of material is refuted by the testimony in this record. The testimony shows that the prices charged by National Screen to petitioners were lower than the prices charged them by the producers (R. 110-112, 130-133), that these lower prices applied to all standing orders from National Screen under the sublicense (R. 134), that these standing orders accounted for the "greatest part" of the materials purchased by petitioners (R. 132, *cf.* 133-134), and that postage charges were added only in the case of reorders above the standing order (R. 28, 134), the size of which was always subject to petitioners' sole control (R. 28-29). Nowhere has either petitioner testified that postage charges or any other factor increased petitioners' overall cost of material under the sublicense agreement.

IV. CONCLUSION.

Petitioners' Reply Brief takes aim at matters not determinative of this appeal. That the aim was wild and off target is not as significant as that the real issue was not even sighted.

The identity of the cause of action in the prior and present actions; the inviolate nature of the consent dismissal with prejudice, which may not be attacked collaterally here; and the estoppel arising from petitioners' own inconsistent conduct over a dozen years,—these are the untouched precepts requiring affirmance.

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